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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 397

CYRIL T. FANECA, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA, NICHOLAS DE B. KATZENBACH, JAMES P. McSHANE, JOHN DOE and RICHARD ROE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Comes now the Petitioner, CYRIL T. FANECA, JR., an adult resident citizen of the State of Mississippi, and prays that a Writ Certiorari be issued to review the Final Judgment entered by the United States Court of Appeals for the Fifth Circuit on June 1, 1964.

CITATIONS TO ORDERS BELOW

A. (1) Final orders of the United States Court of Appeals for the Fifth Circuit, not reported, but set forth in Appendix, attached hereto as Exhibit "A", entered on June 1, 1964, in this suit. (2) Final orders of the United States Court of Appeals for the Fifth Circuit, not reported, in the companion case, and in which part of the opinion bears to this suit and petition, *Virgil Norton, Virgil Wesley, and James Chapman* v. *James P. McShane et al.*, June 1, 1964, in No. 20722, the United States Court of Appeals for the Fifth Circuit, not reported, but set forth in the Appendix and attached hereto as Exhibit "B".

B. Final orders of the United States District Court for the Southern District of Mississippi, not reported, but set forth in the Appendix, attached hereto as Exhibit "C"

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

A. Whether the United States under the Federal Torts Claim Act (28 U.S.C. 1346 (a) (2) (b), and individual respondents, Nicholas deB Katzenbach, James P. McShane, John Doe and Richard Roe, U. S. Officials, are liable in an action for damages for the wrongful and negligent acts of said individual U. S. Officials, acting within the scope of their employment, for the denial of the Petitioner's constitutional rights under the First Amendment, the Fifth Amendment, and Section 1, the Fourteenth Amendment to the United States Constitution.

B. Whether the individual United States officers, Nicholas deB Katzenbach, James P. McShane, John Doe and Richard Roe, are immune from suit, when acting under color of law, but acting wilifully, intentionally and purposely to deprive the Petitioner's constitutional rights under the Civil Rights Act (42 U.S.C. 1983), the First Amendment, the Fifth Amendment, and Section 1, the Fourteenth Amendment to the United States Constitution.

CONSTITUTION AND APPROPRIATE STATUTES

A. This case involves the following constitutional provisions:

1. The First Amendment to the United States Constitution.
2. Section 1, the Due Process Clause of the Fifth Amendment to the United States Constitution.
3. Section 1, the Fourteent Amendment to the United States Constitution.

B. This case involves the following statutory provisions:

1. 28 U.S.C., Sections 1331 (a), 1332 (a)(1), 1343 (3), 1346 (a)(2)(b), 1402 (b), 2201, and 2674.
2. 42 U.S.C. 1983.

These constitutional and statutory provisions are set forth in Appendix attached hereto as Exhibit "D".

STATEMENT OF THE CASE

The Respondent, the United States of America, on the night of September 30, 1962, sent onto the campus of the University of Mississippi, at Oxford, Mississippi, the Respondents. Nicholas deB Katzenbach, James P. McShane, John Doe and Richard Roe, and other unknown

Respondents, U. S. Deputy Marshals and U. S. Border Patrolmen, who surrounded the Lyceum Building on the campus. That subsequent thereto, because of the actions of the Respondents, a riot broke loose. Subsequently, the Petitioner, together with his date, was crossing out of the range of the Respondents, when some six to eight U. S. Deputy Marshals and/or U. S. Border Patrolman, broke from the line surrounding the Lyceum Building, and attacked the Petitioner and his date, when he had asked them and begged them not to do so. They fired tear gas at and upon him and his date, causing them to be nauseous, vomiting, and his date to become hysterical. The Petitioner, because of the above related incidents, brought action in the United States District Court for the Southern District of Mississippi for a denial of his constitutional rights under the First Amendment, the Fifth Amendment and the Fourteenth Amendment to the United States Constitution.

The Petitioner, Cyril T. Faneca, Jr., seeks recovery for damages for the deprivation of his constitutional rights by the Respondents, The United States of America, Nicholas deB Katzenbach, James P. McShane, and unknown Respondents, as result of their acts upon the campus of the University of Mississippi, at Oxford, Mississippi, on September 30, 1962.

Proceedings Below

The Petitioner, Cyril T. Faneca, Jr., filed his suit in the United States District Court for the Southern District of Mississippi, against the United States of America, Nicholas deB Katzenbach, James P. McShane, John Doe, Deputy United States Marshal, Richard Roe, United States Border Patrolman, and other unknown Respondents, for "* * * declaratory judgment and damages for the denial

of his constitutional rights * * *", "* * * under the freedom of speech and peaceful assembly clause of the First Amendment; the right not to be denied liberty without due process under the Fifth Amendment to the Constitution of the United States, and the right not to be denied due process of law under the Fourteenth Amendment."

The Petitioner, Cyril T. Faneca, Jr., sets forth his claims in four counts:

COUNT 1

Count 1 sets forth the claim under the Federal Torts Claim Act (28 U.S.C. 1346 (a)(2)(b)) against all of the Defendants, under the First Amendment, the Fifth Amendment, and the Fourteenth Amendment, that the Defendants all "* * * acting in the scope of their employment * * * did wrongfully and negligently provoke or create a riot or disturbance by the wrongful and negligent and firing into the crowd, tear gas and/or other riot gas projectiles, upon the wrongful and negligent command of the Defendants, the United States, Katzenbach and McShane."; that "* * * the Defendants, John Doe, United States Deputy Marshal and other unknown Marshals and Richard Roe, United States Border Patrolman, and other Border Patrolmen, without warning or provocation did wrongfully and in a negligent manner, charge toward the Petitioner, and after having been pleaded with and begged by the Petitioner not to do so, did wrongfully and negligently fire at or upon the Petitioner certain tear gas or other type of gas projectiles."; that "* * * said United States Deputy Marshals and United States Border Patrolmen were immature, nervous or unseasoned * * *"; that "the direct and the sole proximate cause of the Defendant's acts were to injure and damage the Petitioner, by denying the Petitioner's constitutional right to freedom of speech and did unlaw-

fully and illegally deny the Petitioner's constitutional right to peacefully assemble, without unlawful and illegal harassment and molestation; did unlawfully and illegally deny him the right to life and liberty without due process of law, and did deny the Plaintiff the equal protection of the laws."

COUNT 2

Count 2 sets forth the claim absent the Federal Torts Claim Act (28 U.S.C. 1346 (a)(2)(b)), that all of the Defendants did, in violation of the First Amendment, Fifth Amendment, and the Fourteenth Amendment, under 42 U.S.C. 1983, the same acts as complained of above, "* * * acting under color of law, regulations and instructions of the Defendants, The United States of America, Katzenbach, McShane, did willfully, intentionally and purposely deprive the Petitioner of his constitutional right to peacefully assemble under the First Amendment; did willfully, intentionally and purposely deprive and deny under the Fifth Amendment, his right not to be deprived of life and liberty without due process of law; did willfully, intentionally and purposely deprive the Petitioner of his constitutional rights under the Fourteenth Amendment to due process of law, to life, liberty, and due process of law and equal protection of the laws, by charging the Petitioner, after having been pleaded and begged by the Petitioner not to do so, did willfully, intentionally and purposely fire at, or upon the Petitioner certain tear gas and/or other type of gas projectiles, to intentionally, willfully and purposely deny the Petitioner's constitutional rights heretofore set forth."

COUNT 3

Count 3 sets forth the claim absent the Federal Torts Claim Act (28 U.S.C. 1346 (a)(2)(b)) and constitutional

deprivations, of diversity of citizenship suit for damages for the acts of the individual Defendants, which acts were done in a gross, negligent and wrongful manner, and which acts were set out in detail in Counts 1 and 2.

COUNT 4

Count 4 is a claim similar to Counts 1 and 2 under the Federal Torts Claim Act.

The Petitioner, Cyril T. Faneca, Jr., demanded damages for the deprivation of his constitutional rights in the amount of $40,000.00.

The Respondents filed their motion to dismiss this cause for lack of venue, jurisdiction, and for summary judgment on November 14, 1962. The United States District Court on February 6, 1963, overruled the objection to venue and deferred the jurisdictional questions as well as the motion for summary judgment until the hearing of the merits of the case, by Memorandum Opinion, and entered its Order to this effect on February 14, 1963. The Respondents then filed their motion to reconsider, and the United States District Court overruled this motion to reconsider, by memorandum and order dated April 1, 1963. Interrogatories were requested by the Petitioner, Cyril T. Faneca, Jr., requesting the names of all of the governmental personnel used on the campus of the University of Mississippi, on September 30, 1962. This motion was filed on May 10, 1963, and the names of the various governmental personnel were furnished to the Petitioner, Cyril T. Faneca, Jr., without argument or resistance on behalf of the Respondents. The Petitioner, Cyril T. Faneca, Jr., then moved under Rule 34, FRCP, for production of pictures, description of the individual unknown Respondents; then on June 13, 1963, the Respondents, without resistance

or argument furnished some of the pictures and information of the unknown individual Respondents. The Respondents again on July 22, 1963, moved for summary judgment and for reconsideration of the Court's prior order of deferring the question of summary judgment, and the United States District Court, by Order of September 24, 1963, denied all relief and certified its order for interlocutory appeal, under 28 U.S.C. 1292 (b).

The majority of the Court of Appeals for the Fifth Circuit reversed the United States District Court for the Southern District of Mississippi asserting that the United States was not a party under the Federal Torts Claim Act (28 U.S.C. 1346 (b)) as the actions complained of by the Petitioner were exempt under 28 U.S.C. 2680 as a discretionary function or duty and exempt under 28 U.S.C. 2680 (h) as the acts of the Respondents were assault and battery. Judge Gewin concurred with respect to the nonliability of the United States under the Federal Torts Claim Act, but dissented with regard to the constitutional allegations of the Petitioner, for the reasons stated in his dissent in the case of *Norton et al.* v. *McShane et al.*, No. 20722, which dissents are attached in Exhibits "A" and "B" in the Appendix.

REASONS FOR GRANTING THE WRIT CERTIORARI

Writ Certiorari to review the final orders of the United States Court of Appeals for the Fifth Circuit in this case should issue be caused:

1. The United States Court of Appeals for the Fifth Circuit has decided an important question of Federal Law which has not been, but should be, settled by this Court.

2. The United States Court of Appeals for the Fifth Circuit has decided a question in a way in conflict with the applicable decisions of this Court.

These two grounds for granting of a Writ Certiorari by this Court are so interrelated that discussions under both reasons should be discussed jointly.

I

The majority concludes that the United States[1] is not liable under the Federal Torts Claim Act as the claim against the United States falls within the excepted ambit of 28 U.S.C. 2680 (a)[2] as interpreted through *Dalehite* v. *United States*, 1952, 346 U.S. 15, and 28 U.S.C. 2680 (h).[3]

A serious reading of the *Dalehite* case,[4] *supra*, clearly shows its inapplicability. In the *Dalehite* case,[5] *supra*,

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1. The majority makes no mention of liability of the individual Defendants under Count 1, although such Defendants are indispensable parties to the Federal Torts Claim Act. Nor does the majority or Appellants raise the issue on appeal of proper venue, and thus such is waived. Cf. *Dick* v. *New York Life Ins. Co.*, 1960, 359 U.S. 437, 79 Sup. Ct. 921, 3 L. Ed. 2d 935.

2. "The provisions of this chapter and section, 1346 (b) of this title shall not apply to—

(a) Any claim * * * based upon the exercise of performance of the failure to exercise or perform a *discretionary function or duty on the part of a federal* agency or an employee of the government, whether or not discretion involved be abused." (Emphasis added).

3. "The provisions of this chapter and section 1346(b) of this title shall not apply to—

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

4. 346 U.S. 15.

5. *Ibid.*

the United States, by virtue of a discretionary Act of Congress, was in the business of exporting FGAN fertilizer overseas when the chemical compound exploded in Texas City, Texas. The United States Supreme Court noted that the United States was under no duty to enter into the fertilizer program, but the Act passed by Congress allowing the United States to get into the fertilizer business was purely a *discretionary act* as the United States, under the TVA Program,[6] got into the fertilizer business purely on an experimental basis, and after World War II, by act of the President's Cabinet, decided to institute the fertilizer export to Germany and Japan under the Marshall Plan. Further, the Court considered no questions of constitutional rights as presented here for decision.

On the other hand, the protection of life, liberty and due process, as well as affording the equal protection of the laws, are not *discretionary* governmental functions as these are *constitutional guarantees,* placed in the Constitution of the United States, whereby the United States guarantees the performance of the United States to insure the protection of life, liberty, freedom of speech, assembly, and due process. This is clearly shown in the case of *Logan* v. *U. S.*, 1892, 142 U.S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429,[7] where Logan and others, United States Marshals, were indicted under Sections 5508 and 5509 of the Revised Statutes (18 U.S.C. 241, 242) for conspiracy to deprive persons of their civil rights, and for murder of citizens of the United States. The Supreme Court made the following

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6. 16 U.S.C. 831 (d).

7. The decision of *Logan* v. *U. S.*, 142 U.S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429, has lost none of its vitality but has been in force and expanded under the Supreme Court's decisions in *Screws* v. *U. S.*, 1944, 325 U.S. 91, 65 Sup. Ct. 1031, 89 L. Ed. 1495, and *Monroe* v. *Pape*, 1962, 365 U.S. 167, 81 Sup. Ct. 473, 5 L. Ed. 2d 492.

ruling (144 U.S. 263, 283-284, 12 Sup. Ct. 617, 36 L. Ed. 429, 436):

> *"The United States, having the absolute right to hold such prisoners, had an equal duty to protect them, while so held, against assault of injury from any quarter.* The existence of that duty on the part of the government necessarily implies a corresponding right of the prisoners to be so protected; and this right of the prisoners is a right secured to them by the Constitution and Laws of the United States.
>
> * * *
>
> (144 U.S. 264, 294, 12 S. Ct. 617, 36 L. Ed. 429, 440) *"In the case at bar, the right in question does not depend upon any of the amendments to the Constitution, but arises out of the creation and establishment of the Constitution itself of a national government, paramount and supreme within its sphere of action. Any government which has the power to indict, try and punish for crime, and to arrest the accused and hold them in safekeeping until trial, must have the power and duty to protect against unlawful interference of its prisoners so held, as well as its executive and judicial officers charged with keeping and trying them."*
>
> * * *
>
> (144 U.S. 264, 295, 12 S. Ct. 617, 36 L. Ed. 429, 440) *"The United States are bound to protect against lawless violence all persons in their service or custody in the courts of the administration of justice.* This duty and the correlative right of protection are not limited to the magistrates and officers charged with expounding and executing the laws, but apply, with at least equal force, to those held in custody on accusation of crimes, and deprived of all means of self-defense." (Emphasis added)

The majority's misconception of the Petitioner's Claim 1 under the Federal Torts Claim Act is exposed by its holding "* * * that the tort plaintiff is complaining of is

in essence assault and battery, and his allegations of negligence are not sufficient to avoid Section 2680 (h)". The allegations here are not negligence, but a constitutional denial, and where there is an allegation of a constitutional denial under the Federal Torts Claim Act, the majority cannot engraft into the exceptions under 28 U.S.C. 2680 (h) that which clearly appears from the act itself was not intended, as the express mention of one excluded those not enumerated.[8] Expressed provisions of statutes are not to be annuled by mere implications.[9] Where a legislative body has made a grant with a specific limitation, and has made no other limitation, the conclusive presumption arises that it is intended to make no additional limitations,[10] and the majority point us to no legislative history which conclude that the Federal Torts Claim Act was not set up for the purposes of redressing constitutional denials.

II

Under Court 2 of the Complaint of the Petitioner, Cyril T. Faneca, Jr., the allegations set forth that the Petitioner is entitled to damages for denial of his constitutional rights absent the Federal Torts Claim Act, against all of the Petitioners for denial of his constitutional rights under the Civil Rights Act (42 U.S.C. 1983).[11]

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8. *Collins* v. *Russell*, 1940, 114 F.2d 334, and *City of Tulsa* v. *Midland Valley R.R. Co.*, 1948, 168 F.2d 252.

9. *Braffith* v. *People of the Virgin Islands*, 1938, 26 F.2d 636.

10. *Wabash R.R. Co.* v. *U. S.*, 1910, 178 Fed. 5.

11. The pertinent part of 42 U.S.C. 1983, provides as follows:

"Every person, who, under color of any statute or ordinance, regulation, custom or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to

The majority, relying upon the case of *Barr* v. *Matteo*, 1959, 360 U.S. 564, concludes that judicial, legislative, and executive officers are immune from suits as the claims asserted by necessity set forth that the acts done were beyond their "scope of authority". Further, the majority concludes that 42 U.S.C. 1983, relying upon the case of *Gregoire* v. *Biddle*, 2nd Cir. 1949, 177 F.2d 579, does not apply to federal officers, but applies solely and alone to state officers for acts done "under color" of any state statute, ordinance, regulation, or custom.

It was first recognized that a political body can act only through its judicial, executive, and legislative bodies, and then *only by natural persons*, who, when acting under color of authority, but actually beyond such authority, were in fact acting on behalf of their political bodies when denying another his constitutional rights. This was first recognized in the case of the *Commonwealth of Virginia* v. *Rives*, 1873, 100 U.S. 315, 25 L. Ed. 667, and has been restated in a recent case of *U. S.* v. *Classic*, 1944, 313 U.S. 299, 326, 61 Sup. Ct. 1031, 1943, 85 L. Ed. 1368, where the Supreme Court held as follows:

> "Misuse of power, possessed by virtue of * * * law and made possible only because the wrong-doer is clothed with authority of * * * law, is action taken 'under color of' * * * law."

All of the Respondents were upon the campus of the University of Mississippi at Oxford, Mississippi, not as invites, but under "color of law" of the orders of the United States Court of Appeals for the Fifth Circuit and The United States District Court of the Southern District of Mississippi.

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the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceedings or redress."

Since, therefore, it is not the issue of acting within the "scope of employment" but whether the individual was acting under "color of law", there is left for consideration whether 42 U.S.C. 1983 applies to federal officers as well as state officers.

The Supreme Court, in the case of *Screws* v. *U. S.*, 1944, 325 U.S. 91, 65 Sup. Ct. 1931, 89 L. Ed. 1495, was wrestling with the constitutionality of Section 20 of the Criminal Code, which is presently 18 U.S.C. 242, and which section was originally derived from the Revised Statutes 5509 and 5510 which, in turn, were part of the original Force Acts of 1871, which civil counterparts, enacted at the same time, are presently the Civil Rights Act (42 U.S.C. 1983 and 1985). Section 20 of the Criminal Code was attacked as being too broad and nebulous to set forth a standard of guilt for a crime. The Supreme Court, speaking through Mr. Justice Douglas, held that the Court must in all instances find the statute constitutional, if possible, and the Court would do so by a narrow construction, holding that the accused negro in the custody of the sheriff was denied his constitutional right to due process of law, because the accused was killed and thus not allowed a criminal trial.

The Supreme Court, in addressing itself to the questions of what officials were held guilty of violation of constitutional rights under "color of law", held as follows (325 U.S. 91, 108, 65 Sup. Ct. 1031, 89 L. Ed. 1495, 1506):

> *"Some arguments which have been advanced in support of the contrary conclusions suggest that the question under Section 20 is whether Congress has made it a federal offense for a state officer to violate the law of his state. But there is no warrant for the treating of the question in state law terms.* The problem is not whether state law has been violated but whether

> an inhabitant of a state has been deprived of a federal right by one who acts under 'color of any law'. *He who acts under 'color' of law may be a federal officer or a state officer. He may act under 'color' of federal law or state law.* The statute does not come into play merely because the federal law or the state law under which the officer purports to act is violated. It is applicable when and only when someone is deprived of a federal right by that action. The fact that it is also a violation of a state law does not make it any the less a federal offense punishable as such. Nor does its punishment by federal authority encroach on state authority or relieve the state of its responsibility to punish its state offenses." (Emphasis added.)

To reach the conclusion that federal officers are likewise responsible for acting under "color of law", Mr. Justice Douglas relied upon the case of *Logan* v. *U. S., supra.*

The majority rests its conclusion that acts under "color of law" and immunity of suit by the Respondents ends with the case of *Gregoire* v. *Biddle,* 1949, 2nd Cir., 177 F.2d 579. However, the trail does not terminate at this juncture, for Judge Hand, speaking for the United States Court of Appeals for the Second Circuit, specifically recognized that immunity of officers does not apply with regard to claims under the Civil Rights Act (42 U.S.C. 1983).

Here is the language of the Court (177 F.2d 579, 581):

> "The decision upon which the Plaintiff relies (Picking v. Pa. Rr. Co., 3rd Cir., 151 F.2d 240) indeed holds that the doctrine of absolute immunity for official acts does not cover claims arising under (section) 43 of the Civil Rights Act; * * *."

The immunity trail does end with the recent decision of *Monroe* v. *Pape,* 1962, 365 U.S. 167, 5 L. Ed. 2d 492, 81 Sup. Ct. 473, and the decision in *Nesmith* v. *Alford,* 1963,

318 F.2d 110, which cases were cited by the Petitioner, but were not considered by the majority.

In the case of *Monroe* v. *Pape, supra* (365 U.S. 167, 5 L. Ed. 492, 81 Sup. Ct. 473), a negro brought suit against the City of Chicago, Illinois, and various policemen, sheriffs, justices of the peace, state's attorney, and several John Doe state officers, under 42 U.S.C. 1983, for invasion of his home, and subsequent search without a warrant, arrest and detention without a warrant and without arraignment. The United States District Court dismissed the suit on the ground that the complaint alleged no cause of action under 42 U.S.C. 1983, or under the Federal Constitution because of the individual defendants' official capacity and common law immunity. The Supreme Court, speaking through Mr. Justice Douglas, reversed the lower court and held that the invasion of the home of the plaintiff without a search warrant, the arrest and detention without a warrant, and without arraignment, constituted deprivation of constitutional rights of the petitioner under 42 U.S.C. 1983, as the police officials were acting under "color of law" and thus swept aside any defense immunity. Mr. Justice Douglas, in reaching such conclusion on behalf of the United States Supreme Court, relied upon his previous decision in *Screws* v. *U. S., supra* (325 U.S. 91, 89 L. Ed. 1495, 65 Sup. Ct. 1031), and held that the same interpretation of acts under "color of law" under 18 U.S. 241 and 242, applied with like force to 42 U.S.C. 1983. Here is the language of the Court (365 U.S. 167, 187, 81 Sup. Ct. 473, 5 L. Ed. 2d 492, 505):

> "*We conclude that the meaning given 'under color of law' in the Classic Case and in the Screws Case and Williams Case was the correct one; and we adhere to.*
>
> "In the Screws Case we dealt with the statute that imposed criminal penalties for acts 'willfully' done.

> We construed that the word in its setting to mean the doing of an act with a 'specific intent to deprive a person of a federal right'. 325 U.S. at 103. *We do not think that gloss should be placed on Section 1979* (42 U.S.C.A. 1983) *which we have here.* The word 'willfully' does not appear in Section 1979. Moreover, Section 1979 provides a civil remedy, while in the Screws Case, we dealt with a criminal law challenged on the ground of vagueness. Section 1979 *should be read against the background of tort liability that makes a man responsible for the natural consequences of his* actions." (Emphasis added.)

In the case of *Nesmith* v. *Alford*, 1963, 318 F.2d 110, the Fifth Circuit had an occasion to determine whether or not the imposition of absolute immunity could be used as a defense by a police officers in the arrest of individuals claiming to have a civil right under the First Amendment of freedom of speech and assembly. The Court swept aside the defense of immunity, wedding itself to *Monroe* v. *Pape, supra* (365 U.S. 167, 81 Sup. Ct. 473, 5 L. Ed. 2d 492) using the following language (318 F.2d 110, 124-125):

> "Certainly since Monroe v. Pape, 191, 365 U.S. 167, 187, 81 Sup. Ct. 473, 5 L. Ed. 2d 492, violation of some of the Civil Rights of these Plaintiffs was *established as a matter of law. These included the freedom from unlawful arrest, freedom of speech and freedom of association.* * *"*

> "It is equally clear *that the personal accountability of each of the three officer defendants was established as a matter of law with respect to some of* these violations." (Emphasis added.)

The majority points to none, and our research fails to divulge that there is any justification for sweeping away the immunity of state police officers when they violate the civil rights of a complaint under the Constitution of the

United States, but would grant immunity to federal officers for the same acts.

"In view of our decision that the Constitution prohibits the (state officers from imposing the defense of immunity), it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government", to paraphrase the words of Mr. Chief Justice Earl Warren.[12] The justification for granting immunity would certainly run in favor of the state official, for he is called upon by far more to enforce the laws, regulations, and ordinances of both the city, county, state, and nation, as opposed to the few specifically enumerated duties of the United States Marshal.

CONCLUSION

We respectfully pray for the foregoing reasons that this Court grant this Petition for Writ Certiorari and review the final orders entered by the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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12. *Boling* v. *Sharpe*, *supra*, 347 U.S. 947, 500, 74 Sup. Ct. 693, 98 L. Ed. 884, 887.

EXHIBIT "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20906

UNITED STATES OF AMERICA, ET AL.,
Appellants,

versus

CYRIL T. FANECA, JR.,
Appellee.

Appeal from the United States District Court for the Southern District of Mississippi.
(June 1, 1964.)

Before RIVES, WISDOM and GEWIN, Circuit Judges.

RIVES, Circuit Judge: The plaintiff, Cyril T. Faneca, Jr., filed this suit to recover damages resulting from alleged tortious and unconstitutional conduct in connection with the Government's efforts to effect the enrollment of James H. Meredith, a Negro, as a student at the University of Mississippi pursuant to the orders of this Court and the District Court for the Southern District of Mississippi. The defendants are the United States; Nicholas de B. Katzenbach, Deputy Attorney General of the United States; and James P. McShane, Chief of the Executive Office of the United States Marshals. The District Court for the Southern District of Mississippi denied the defendants' motion for sum-

mary judgment and motions to dismiss. This interlocutory appeal was certified and granted in accordance with 28 U.S.C. §1292(b).

As against the United States, plaintiff sues under the Fedeal Tort Claims Act, 28 U.S.C. §1346(b). Plaintiff alleges that the presence of the defendants on the campus of the University of Mississippi caused a large crowd of persons to congregate around the Lyceum Building: that on the wrongful and negligent command of the defendants tear gas or other riot gas projectiles were negligently fired into the crowd, thus provoking a riot or disturbance, and, further, that the United States, Katzenbach, and McShane lacked skill and ability in the formulation of plans or control of their personnel and should have known that the Deputy Marshals and Border Patrolmen were immature, nervous, or unseasoned in the use of gas projectiles and the controlling of large groups of persons. The plaintiff, a student at the University of Mississippi, alleges that he was walking on the campus when he was confronted by a group of marshals and Border Patrolmen, who, without warning or provocation, "wrongfully and in a negligent manner" charged toward plaintiff and fired gas projectiles at him, despite the fact that he begged them not to do so. He alleges that this denied him his rights to freedom of speech, to peacefully assemble, to life and liberty under due process of law, and to the equal protection of the laws.

The allegations in plaintiff's counts against Katzenbach and McShane are the same as those under the Federal Tort Claims Act, except that he alleges that the marshals and Border Patrolmen who fired at plaintiff did so willfully, intentionally, and purposefully, and acted under instructions by the defendants. No conspiracy is alleged.

Insofar as the plaintiff seeks recovery from the Deputy Attorney General and the Chief of the Executive Office for

the United States Marshals, we make specific reference to our discussion of the doctrine of official immunity in No. 20722, *Norton* v. *McShane*, decided this day. Under the principles stated therein, it is clear that the formulation of plans and the manner of control over Government personnel were functions within the outer perimeter of the line of duty of these officers and involved decisions which it was necessary that they be free to make without fear or threat of vexations or fictitious suits. The defendants are therefore immune from liability. Again, 42 U.S.C. §1983 does not apply since defendants were acting under color of federal law, not state law.

The plaintiff asserts that the United States is liable under the Federal Tort Claims Act, 28 U.S.C. §1346(b). The United States, however, states that the Act is not applicable because of the exception in 28 U.S.C. §2680(a). Section 2680 provides in part:

> "The provisions of this chapter and section 1346-(b) of this title shall not apply to—
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> "(a) Any claim . . *based upon the exercise or performance* or th. ailure to exercise or perform *a discretionary function or duty* on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." (Emphasis added.)

The pr nary authority on "discretion ry function or duty" is *Dalehite* v. *United States*, 1952, 346 U.S. 15, which dealt with the decision to use certain explosives in the preparation of FGAN fertilizer. The Court said:

> "The 'discretion' protected by the section is not that of the judge—a power to decide within the limits of positive rules of law subject to judicial review. It is the discretion of the executive or the administrator to act according to one's judgment of the best course, a

concept of substantial historical ancestry in American law." 346 U.S. at 34.

The Court added:

> "It is necessary to define, apart from this case, percisely where discretion ends. It is enough to hold, as we do, that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in *establishing plans, specifications or schedules of operations.* Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of §2680 (a) would fail at the time it would be needed, that is, when a subordinate performs or fails to performs a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion." 346 U.S. 35-36. (Emphasis added.)

Just as the tasks of carrying out the orders of this Court and of handling an unruly mob are among the responsibilities of the Chief Marshal and the Deputy Attorney General, so is the choice of means for performing these tasks peculiarly within their discretion. The discretion to choose the *modus operandi* and to decide the time in which to put it into action was specifically delegated to McShane and Katzenbach.

The plaintiff argues that *Logan* v. *United States,* 1892, 144 U.S. 263, establishes a federal *duty* to protect law and order and the administration of federal justice; he then contrasts "governmental duty" with "discretionary function." The same argument was rejected in *Dalehite.* Section 2680(a) excepts from the Tort Claims Act both dis-

cretionary functions and discretionary duties. It is clear that the United States has a *duty* to maintain law and order and to enforce the commands of its courts; just how best to fulfill this duty is wholly within the *discretion* of its officers. Of course, absent waiver of sovereign immunity in the Tort Claims Act or elsewhere, there can be no suit against the United States.

Nor can plaintiff recover under the Tort Claims Act for the "negligent" firing on him by the group of marshals and Border Patrolmen. Section 2680(h) of title 28 excepts from the Act claims arising from intentional torts such as assault and battery. The tort plaintiff is complaining of is in essence assault and battery, and his allegations of negligence are not sufficient to avoid section 2680(h). See *Alaniz* v. *United States*, 10 Cir. 1958, 257 F. 2d 108; *Stepp* v. *United States*, 4 Cir. 1953, 207 F.2d 909, *cert. denied*, 347 U.S. 933; *Lewis* v. *United States*, 3 Cir. 1952, 194 F.2d 689; *cf. Klein* v. *United States*, 2 Cir. 1959, 268 F.2d 63. The fact that constitutional rights may also have been invaded is not in itself sufficient to avoid the exception of section 2080(h). *Cf., Bell* v. *Hood*, S.D. Cal. 1947, 71 F.Supp. 813, 817.

The judgment of the district court is reversed and the cause remanded with directions to enter judgment for the defendants on their motion for summary judgment.

REVERSED WITH DIRECTIONS.

GEWIN, Circuit Judge, Concurring in part and Dissenting in part:

I concur in the result reached by the majority with respect to the non-liability of the United States under the Federal Tort Claims Act, 28 U.S.C.A. 1346(b). Under the facts alleged and in the circumstances of the case, I likewise concur with the result reached as to the alleged

wrongful and negligent acts on the part of the individual defendants.

With respect to the conduct of the defendants (other than the United States) which is alleged to be willful, intentional and purposeful, I respectfully dissent, for the reasons stated in my dissent in the case of *Norton, et al.* v. *McShane, et al.*, No. 20722.

EXHIBIT "B"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20722

VIRGIL NORTON, VIRGIL WESLEY and JAMES CHAPMAN,

Appellants,

versus

JAMES P. McSHANE, ET AL.,

Appellees.

Appeals from the United States District Court for the Northern District of Mississippi.
(June 1, 1964.)

Before RIVES, WISDOM and GEWIN, Circuit Judges.

RIVES, Circuit Judge: This appeal consists of three essentially identical actions, consolidated for appeal, all of which seek actual and punitive damages for alleged deprivation of certain rights of the plaintiffs growing out of their arrest near Oxford, Mississippi, on October 1, 1962. The plaintiffs are Virgil Norton, Virgil Wesley, and James Chapman. Named as defendants are Nicholas de B. Katzenbach, Deputy Attorney General of the United States; James P. McShane, Chief of the Executive Office of the United States Marshals; John Doar, First Assistant to the Assistant Attorney General, Civil Rights Division;

and William Tucker, Deputy United States Marshal. The suits were commenced in the Circuit Court of Lafayette County, Mississippi, and were removed to the United States District Court for the Northern District of Mississippi. See 28 U.S.C. §1441(a), §1442(a). Treating the defendants' motions to dismiss as motions for summary judgment, the district court held that all of the defendants were acting within the scope of their authority and are immune from the liability alleged in these suits. Its opinion is reported at 33 F.R.D. 131 (N.D. Miss. 1963). Their complaints having been dismissed, the plaintiffs brought this appeal.

The plaintiffs allege that on October 1, 1962 (the day following the enrollment of James H. Meredith, a Negro, at the University of Mississippi) they were riding in an automobile on a highway approximately four miles east of Oxford, Mississippi, when the defendants unlawfully and maliciously arrested them without probable cause. The plaintiffs further allege that the defendants maliciously detained them without charges for twenty-one hours, during which time they were made to sit in a rigid position for eighteen hours without speaking, eating, or drinking. They allege that the defendants forced them to witness horrible and nauseating mistreatment of others, fingerprinted and "mugged" them, and subjected them "to all manner of vile abuse and mistreatment." Moreover, they allege that the defendants maliciously committed assault and battery on them with a large stick or billy club. Other counts allege a conspiracy by defendants to deprive plaintiffs of the equal protection of the laws and equal privileges and immunities under the laws and to prevent or hinder state authorities from giving them equal protection. The plaintiffs apparently are seeking relief under both common law and the Civil Rights Act, 42 U.S.C. §§1983, 1985(3).

I. Common Law.

Any case involving the doctrine of executive or official immunity requires the court to resolve a sharp conflict between two important considerations: the protection of the individual citizen against damage caused by oppressive or malicious action on the part of public officers, and the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits based on acts done in the exercise of their official responsibilities.[1]

As to judicial, legislative, and executive officers the test to determine the existence of immunity from suits for monetary recovery based on allegedly wrongful conduct is whether or not the officers were acting within the scope of their authority or in the discharge of their duties. The controversy has centered around how broadly "scope of authority" should be interpreted—i.e., would malicious acts be within the officers' scope of authority? Initially, the broadest interpretation of scope of authority was applied to judicial and legislative officers so as to protect them from civil suits to recover for actions taken by them in the exercise of their official functions, irrespective of the motives with which those acts were alleged to have been performed. By 1896 this broad interpretation had been carried over to heads of executive departments, provided the action had "more or less connection with the general matters committed by law to [their] control or supervision." *Spalding* v. *Vilas*, 1896, 161 U.S. 483, 498. After that time the doctrine of broad interpretation began to spread to subordinate of-

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1. Barr v. Matteo, 1959, 360 U.S. 564, 565; Gregoire v. Biddle, 2 Cir. 1949, 177 F.2d 579, 581, *cert. denied*, 339 U.S. 949.

ficials, directly leading to the present state of the law.[2] The modern approach to official immunity is exemplified by Judge Learned Hand's opinion in *Gregoire* v. *Biddle*, 2 Cir. 1949, 177 F.2d 579, *cert. denied*, 339 U.S. 949. Judge Hand's oftquoted analysis is as follows:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty

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2. Excellent discussions of this history may be found in Gregoire v. Biddle, supra, n. 1; Papagianakis v. The Samos, 4 Cir. 1950, 186 F.2d 257, *cert. denied*, 341 U.S. 921 (1951); *Developments in the Law-Remedies Against the United States and Its Officials*, 70 Harv.L.Rev. 827, 834-38 (1957)

> to the constant dread of retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books" 177 F.2d at 581.

This statement of the law is made binding on us by the express approval afforded it by the Supreme Court in *Barr* v. *Matteo*, 1959, 360 U.S. 564, 571-72.[3] The Supreme Court clearly indicated that allegations of malice are not sufficient to prevent the application of executive immunity: "The fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint . . . ." 360 U.S. at 575. The requirements that the act be within the outer perimeter of the line of duty is no doubt another way of stating that the act must have more or less connection with the general matters committed by law to the officer's control or supervision, and not be manifestly or palpably beyond his authority. See *Spalding* v. *Vilas*, *supra* at 498.

In *Barr* v *Matteo*, *supra*, the Court also held that the rank of the officer, in itself, does not determine the applicability of the doctrine:

> "We do not think that the principle announced in *Vilas* can properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts. The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation

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3. Although *Barr* v. *Matteo* involved a suit based on defamation, the majority opinion clearly implies that the rules of law expressed therein apply to civil tort suits generally; and the opinion has been so construed in subsequent cases. See, e.g., Bershad v Wood, 9 Cir. 1961, 290 F.2d 714, 719

and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.

"To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, the wider the scope of *discretion*, it entails. It is not the title of his office but the *duties* with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,' *Spalding* v. *Vilas, supra,* at 498—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits." 360 U.S. at 572-74. (Emphasis added.)[4]

There is another limiting factor—the nature of the duties. It is often said that the officer must be performing a "discretionary function." In *Ove Gustavsson Contracting Co.* v. *Floete,* 2 Cir 1962, 299 F.2d 655, *cert. denied,* 374 U.S. 827, Judge Medina explained what this requirement actually means:

"There is no litmus paper test to distinguish acts of discretion . . ., and to require a finding of 'discretion' would merely postpone, for one step in the process of reasoning, the determination of the real question—is the act complained of the result of a judgment or decision which it is necessary that the Gov-

4. "[S]ound policy would seem to place on level ground all official duties involving the exercise of judgment and discretion." Ove Gustavsson Contracting Co. v. Floete, 2 Cir. 1962, 299 F.2d 655, 659, *cert. denied,* 374 U.S. 827.

ernment official be free to make without fear or threat of vexations or fictitious suits and alleged personal liability?" 299 F.2d at 659.

The federal courts have applied the doctrine of official immunity to suits against numerous officials for many different torts.[5] By the great weight of authority, law enforcement officers are immune from civil suits

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5. The following list of cases, although by no means exhaustive, gives some idea of the breadth of application of the doctrine: Barr v. Matteo, *supra*, note 1 (Acting Director of Office of Rent Stabilization—malicious defamation); Howard v. Lyons, 1959, 360 U.S. 593 (Commander of Boston Naval Shipyard—defamation); Gregoire v. Biddle, *supra*, note 1 (Attorney General of the United States, Director of the Enemy Control Unit of the Department of Justice, District Director of Immigration—malicious arrest); Ove Gustavsson Contracting Co. v. Floete, *supra*, note 4 (Contracting Officers of GSA); Papagianakis v. The Samos, *supra*, note 2 (Immigration Officials—false imprisonment); Cooper v. O'Connor, D.C. Cir. 1938, 99 F.2d 135 (FBI Agent, Comptroller of the Currency of the United States, United States Attorney, Assistant United States Attorney, etc. —malicious prosecution); Laughlin v. Rosenman, D.C. Cir. 1947, 163 F.2d 838 (President's Special Counsel, Attorney General, Special Assistant to the Attorney General, Director of Federal Prisons, Warden of Penitentiary—malicious prosecution); Brownfield v. Landon, D.C. Cir. 1962, 307 F.2d 389, *cert. denied*, 371 U.S. 924 (Air Force Inspector—defamation); Laughlin v. Garnett, D.C. Cir. 1943, 138 F.2d 931 (United States Attorney, Police Officer—malicious prosecution); Swanson v. Willis, D. Alaska, 1953, 114 F.Supp. 434, *aff'd per curiam*, 220 F.2d 440 (9 Cir.) (Deputy United States Marshal—battery, false arrest); Bershad v. Wood, *supra*, note 3 (internal Revenue Service Officers); Waterman v. Nelson, 2 Cir. 1949, 177 F.2d 965 (Director Civil Service Region); Koch v. Zuieback, S.D. Cal. 1961, 194 F.Supp. 651, *aff'd*, 316 F.2d 1 (local draft board officials); Hartline v. Clary, E.D. S.C. 1956, 141 F.Supp. 151 (Special Agents of Alcohol & Tobacco Tax Division—malicious assault); Gamage v. Peal, N.D. Cal. 1963, 217 F.Supp. 384 (Air Force doctor); Toscano v. Olesen, S.D. Cal. 1960, 189 F.Supp. 118 (Postal Inspector); Blitz v. Roog, 2 Cir. 1964, 328 F.2d 596 (Government psychiatrist —false imprisonment).

based on allegedly malicious acts. See, *e.g.*, *Cooper* v. *O'Connor*, D.C. Cir. 1938, 99 F.2d 135, 139; *Swanson* v. *Willis*, D. Alaska 1953, 114 F.Supp. 434, *aff'd per curiam*, 220 F.2d 440 (9th Cir.); *Laughlin* v. *Garnett*, D.C. Cir. 1943, 138 F.2d 931; *Hartline* v. *Clary*, E.D. S.C. 1956, 141 F.Supp. 151; *Toscano* v. *Olesen*, S.D. Cal. 1960, 189 F.Supp. 118. The case of *Kozlowski* v. *Ferrara*, S.D. N.Y. 1954, 117 F.Supp. 650, stands alone among federal cases in holding that an FBI agent is not in a high enough position of responsibility to be entitled to immunity. That case would seem to be now controlled by *Barr* v. *Matteo* and *Gustavsson*.[6]

Up to this time we have not referred to cases brought under the Civil Rights Acts, such as *Lewis* v. *Brautigam*, 5 Cir. 1955, 227 F.2d 124. The question involved in these cases is the extent, if any, to which the Civil Rights Acts have abrogated the immunity doctrine. While it is clear

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6. There is dicta in Hughes v. Johnson, 9 Cir. 1962, 305 F.2d 67, 70, that there is no immunity for an unlawful search and seizure. No authority was cited for that statement, and it would seem to be contrary to that court's holding in Bershad v. Wood, 9 Cir. 1961, 290 F.2d 714.

We do not consider as being in point such cases as Colpoys v. Foreman, D.C. Cir. 1947, 163 F.2d 908, and McVey v. Gross, N.D. Tex. 1926, 11 F.2d 379, since they involved suits on a statutory bond. See 28 U.S.C. §544(c); *cf.* Swanson v. Willis, *supra* n. 5, at 435. Likewise, Wilson v. Bittinger, D.C. Cir. 1958, 262 F.2d 714, was based on sections 11-735 and 11-724 of the D.C. Code.

The immunity to be afforded federal officers is governed by federal law. See Wheeldin v. Wheeler, 1963, 373 U.S. 647, 652. In common law actions against state officers, such as in Nesmith v. Alford, 5 Cir. 1963, 318 F.2d 110, the doctrine of immunity is controlled by state law under Erie R.R. v. Tompkins, 1938, 304 U.S. 64. In Nesmith immunity was not raised as a defense except as to one quasi-judicial officer, who was in fact held to be immune.

that the common-law immunity afforded legislative[7] and judicial[8] officers applies in suits under the Civil Rights Acts, there remains much uncertainty as to the extent to which immunity for subordinate executive officials applies, if it applies at all.[9] In view of our conclusion later in this opinion that the instant suits are not within the purview of the Civil Rights Acts, we do not decide at this time the scope of official immunity under those statutes. We need only say that the doctrine may be given more limited application in those suits than it has been given at common law.

We are left to the hard choice of deciding whether the extremely aggravated wrongs as alleged in the complaint must remain unredressed because of the countervailing consideration of public policy expressed in *Barr* v. *Matteo, supra,* 360 U.S. at 576:

> "To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good."[10]

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7. See Tenney v. Brandhove, 1951, 341 U.S. 367.

8. See, *e.g.*, Kennedy v. Fox, 6 Cir. 1956, 232 F.2d 288. The *Nesmith* case, *supra* n. 6, would seem to fit into this category.

9. See generally, Note, *The Doctrine of Official Immunity Under the Civil Rights Acts*, 68 *Harv. L. Rev.* 1229 (1955); Comment, *Civil Liability of Subordinate State Officials Under the Civil Rights Acts and the Doctrine of Official Immunity*, 44 *Calif. L. Rev.* 887 (1956). The problem was first raised in Pickering v. Pennsylvania R.R., 3 Cir. 1945, 151 F.2d 240, 250. It was discussed, but questionably resolved, in Hoffman v. Halden, 9 Cir. 1959, 268 F.2d 280, 298-300. See also, Rhodes v. Houston, D.Neb. 1962, 202 F.Supp. 624, 636, *aff'd per curiam*, 309 F.2d 959, *cert. denied*, 372 U.S. 909.

10. Most writers agree that if the Federal Tort Claims Act were amended to allow such suits as the instant one to be brought

To make the court's choice less difficult, and to negative any charges that would lead to the conclusion that the acts of the defendants were beyond the outer perimeter of their line of duty, the defendants properly employed the modern procedure of offering testimony in support of their motions to dismiss treated as motions for summary judgment. Rules 12(c) and 56(e), Fed.R.Civ.P. The defendants offered the affidavit of Honorable Robert F. Kennedy, the Attorney General of the United States, that, at his direction, each of the defendants was in the performance of his official duties described in the affidavit, including the execution and enforcement of the orders of this Court and of the United States District Court for the Southern District of Mississippi. Mr. Kennedy's affidavit concluded:

> "That at all relevant times and places set forth in the complaints in *James Chapman* v. *James P. McShane, et al., Virgil Wealey* (sic) v. *James P. McShane, et al.*; and *Virgil Norton* v. *James P. McShane, et al.*, defendants Katzenbach, Doar, McShane and Tucker were discharging their official governmental responsibilities—Mr. Katzenbach as Depty Attorney General and Mr. McShane as Chief of the Executive Office for United States Marshals and as a Deputy United States Marshal, Mr. Doar as an officer of the Department of Justice, and Mr. Tucker as a Deputy United States Marshal."

In the face of the Attorney General's affidavit, the plaintiffs cannot rest upon the mere allegations of their complaints unsupported by sworn testimony. It became incumbent on the plaintiffs, by affidavits or otherwise as

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against the United States, both policy interests would be served. See, *e.g.*, Davis, *Administrative Officers' Tort Liability*, 55 *Mich. L. Rev.* 201 (1956); 3 Davis, *Administrative Law Treatise*, §2607 (1958 ed. & 1963 Supp.).

provided in Rule 56, *supra,* to set forth specific facts showing that there was a genuine issue for trial as to whether the defendants were acting within the line and scope of their official duties. See *Cunningham* v. *Securities Investment Company,* 5 Cir. 1960, 278 F.2d 600, 602, 603. The plaintiffs introduced no evidence whatever, and thus failed completely to meet the burden resting upon them.

In that state of the record, we must assume that to the extent the defendants allegedly acted overzealously or maliciously, they were nevertheless acting within the outer perimeter of their line of duty, and the alleged acts had more or less connection with the general matters committed by law to their control and supervision. Moreover, we are of the opinion that the selection of a proper method of enforcing a court's orders in the face of active opposition and obstruction is a decision which it is necessary that these officers be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability.

II. The Civil Rights Act, 42 U.S.C. §1983.

The plaintiffs assert that they have alleged a cause of action under 42 U.S.C. §1983, which is a federal civil rights statute imposing civil liability on any "person who, under color of any statute, ordinance, regulation, custom, or usage, *of any State or Territory*" subjects anyone to the "deprivation of rights, privileges, or immunities secured by the Constitution and laws." (Emphasis added.) Thus the person must be acting under color of *state* law for the section to apply, whereas the defendants in the instant suits were acting under color of *federal* law. As Judge Hand stated in the *Gregoire* case, "Section 43 [the precursor of §1983] is so plainly limited to acts done under

color of some state or territorial law or ordinance that no discussion can make it clearer than appears from its reading." 177 F.2d at 581. *Accord, Papagianakis* v. *The Samos,* 4 Cir. 1950, 186 F.2d 257, 262, *cert denied,* 341 U.S. 921 (1951); *Swanson* v. *Willis, supra*; *Laughlin* v. *Rosenman,* D.C. Cir. 1947, 163 F.2d 838, 843; *cf. Wheeldon* v. *Wheeler,* 1963, 373 U.S. 647, 650 n. 2, 652.[11] The new venue section, 28 U.S.C. §1391(e), certainly does not expand the scope of coverage of 42 U.S.C. §1983.[12]

III. The Civil Rights Act, 42 U.S.C. §1985(3).

Plaintiffs allege a conspiracy to deprive them of equal protection of the laws and equal privileges and immunities under the laws and to prevent or hinder state authorities from giving them equal protection. Thus plaintiffs are trying to invoke 42 U.S.C. §1985(3), which provides a right of action for damages,

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11. The criminal section, 18 U.S.C. §242, however, applies to persons acting "under color of *any* law." (Emphasis added.) Because of section 1983's additional limitation to persons acting under color of state or territorial law, cases decided under the criminal section, such as Screws v. United States, 1944, 325 U.S. 91, and Logan v. United States, 1892, 144 U.S. 263, are not relevant as to section 1983 even though they involve persons acting under color of federal law. See cases cited in text. The case of Monroe v. Pape, 365 U.S. 167, involved section 1983, but the suit was against state officers acting under color of state law. While the Court gave the same definition to "under color of" as was used in *Screws,* it did not extend the coverage of 1983 to those acting under color of federal law.

12. The purpose of the new section was to make it possible to bring actions against government officials and agencies in district courts outside of the District of Columbia. It was intended that the new section "not create new liabilities or new causes of action against the U.S. Government" and "not give access to the Federal courts to an action which cannot now be brought against a Federal Official in the U.S. District Court for the District of Columbia." S.Rep. No. 1992, 87th Cong., 2d Sess. (1962).

> "if two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . ."

However, the facts alleged amount to malicious arrest and detention, assault and battery, and sundry deprivations of due process. To come within this statute, plaintiffs would have to allege facts amounting to intentional and purposeful discrimination to the plaintiffs individually or as members of a class. *Snowden* v. *Hughes*, 1944, 321 U.S. 1. This the plaintiffs have not done. See *Whittington* v. *Johnson*, 5 Cir. 1953, 201 F.2d 810, *cert denied*, 346 U.S. 867; *Dunn* v. *Gazzola*, 1 Cir. 1954, 216 F.2d 709, 711; *Miles* v. *Armstrong*, 7 Cir. 1953, 207 F.2d 284; *Morgan* v. *Null*, S.D. N.Y. 1954, 120 F.Supp. 803.[13]

For the reasons stated herein the district court's dismissal of the three suits is

AFFIRMED.

GEWIN, Circuit Judge, Dissenting:

This case does not involve the allegation of negligence on the part of federal officials and officers in the performance of their duties in undertaking to carry out orders of court. Rather the complaint charges the defendants with an *unlawful, willful* and *malicious* denial of funda-

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13. Although we realize that there is some authority to the effect that 42 U.S.C. §1985(3) applies only where some of the persons so conspiring acted under color of state law (see Koch v. Zuieback, 194 F. Supp. 651, 656-658, *aff'd*, 316 F.2d 1 (9 Cir. 1963)), we do not find it necessary to pass on that question.

mental constitutional rights, *without probable cause*; and facts which constitute the conduct alleged are set forth in the complaint. Accordingly, it is important to keep in mind that we are not considering mere negligent conduct, but complaints in which strong cases have been alleged, and if the allegations are supported by the facts, the constitutional rights of the plaintiffs have been ruthlessly violated without probable cause in an unalwful, willful and malicious manner.

Nothing herein said should be interpreted as giving any sanction or comfort to those who precipitated the problem which existed at the University of Mississippi at Oxford, Mississippi, on September 30, 1962. What I have to say relates more particularly to what I consider to be procedural errors and a misinterpretation of substantive law. I am deeply conscious of the fact that the defendants are high-ranking federal officials; but on the present state of the record we are not determining guilt or innocence, or the truth or falsity of the charges laid in the complaint. In my view the questions involved relate to whether the plaintiffs have stated a cause of action which entitles them to the right to present proof. Until all of the issues are resolved by a full and complete hearing, giving the plaintiffs the right to prove their case, I must respectfully dissent.

"The federal courts have applied the doctrine of official immunity to suits against numerous officials for many different torts. By the great weight of authority, law enforcement officers are immune from civil suits based on allegedly malicious acts." (Citing cases.)

The foregoing is a full paragraph from the majority opinion, except that it is stated therein that there is only one federal case which constitutes an exception to the

rule. The quoted statement is not taken out of context. It forcefully demonstrates the failure of the majority to follow recent decisions of this Court to the effect that a litigant, civil or criminal, has an absolute right of freedom of speech—no matter how provocative—and assembly, under the first amendment to the Constitution without interference,[1] and when such rights are infringed, no matter how slight or how much in good faith, by a police officer, such officer is answerable in damages for such interference.[2] As a theoretical discourse on the doctrine of complete immunity, the majority opinion is brilliant. In my view, the opinion incorrectly states the law and misinterprets the procedural realities of the case.

The majority opinion is tied to three legal concepts: (a) the doctrine of immunity; (b) summary judgments; and (c) the assertion that the civil rights statutes apply only to state officials and, therefore, as to liability for civil damages, federal officers are uninhibited legally in their conduct with respect to the citizens of this country. These concepts will be discussed in the order mentioned.

The plaintiffs filed a civil suit against the defendants alleging that the defendants, individually and pursuant to a conspiracy, committed unlawful, malicious, forceful and violent conduct upon the plaintiffs at a time when the plaintiffs were lawfully proceeding down a public highway four miles distant from the small city of Oxford, Mississippi; that the plaintiffs were taken into custody against their will, and upon request the officers refused to advise them why they were being so taken; that they were placed in a crowded prison compound in a small building and compelled to sit with their hands locked

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1. *Core* v. *Douglas*, (1963 5th Cir.) 318 F.2d 95.

2. *Nesmith* v. *Alford*, (1963 5th Cir.) 318 F.2d 110.

around their knees, feet crossed, with eyes and head straight forward, back straight at all times; were denied food and drink, forbidden to speak or move, and in such position were compelled to witness horrible and nauseating mistreatment of other citizens; and were maliciously assaulted and battered with a large stick or "billy club."

It is alleged that the plaintiffs were so taken, confined and treated for a period of twenty-one hours; and that all of the foregoing acts were committed by the defendants without any reasonable or probable cause.[3] The majority has concluded that the acts just described constitute no violation of the civil law for which damages can be awarded, and that the defendants are insulated and protected from liability for civil damages by an impenetrable cloak of immunity. Such is the conclusion of the majority notwithstanding numerous cases by this Court and the Supreme Court pronouncing serious limits and powerful inhibitions upon law enforcement officers, even when they are dealing with known criminals. For example, the criminal must be informed of the charges against him and taken immediately to a magistrate;[4] he must be advised of his constitutional rights before he is permitted to speak about the crime with which he is charged; a person cannot be arrested without a lawful warrant unless the officer has probable cause;[5] and he is entitled to counsel immediately;[6] to mention only a few

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3. In addition to the foregoing allegations, the plaintiff Chapman alleged:

> "Plaintiff was also made ill by defendants taking from him and causing to be taken from him his medicine, that had been furnished him as a disabled veteran of World War II by the Veterans Administration to keep him from losing consciousness, and that as a consequence he did lose consciousness."

4. *Mallory v. U.S.*, (1957) 354 U.S. 449, 1 L.Ed. 2d 1479.

5. *Henry* v. *U.S.*, 361 U.S. 98, 4 L.Ed. 2d 134 (1959)

6. *Lee* v. *U.S.*, (5th Cir. 1963) 322 F.2d 770.

of the rights guaranteed to citizens and protected by the law, when officers are dealing with them.

If the holding of the majority is the law of the land, anyone who wears the badge of federal authority is licensed to commit all manner of evil against citizens with impunity, and the citizen must cower in fear and trembling, defenseless, and without a legal remedy. No redress can be sought, according to the majority, because such officers are immune and are not amenable to damages. Executive officers and all officers of the law are entitled to respect and obedience, but respect and obedience will soon fade away if officers of the federal government can engage in the conduct described with complete immunity. The best way to engender and gain respect is to give respect to others. In my view there could never be a situation, with the possible exception of war or revolution, which would give anyone, regardless of his badge of authority or the authority vested in him, the right to engage in the conduct of which the defendants have been accused. As said in one of the recent opinions of this Court, *Nesmith* v. *Alford*, 310 F.2d 110 (5th Cir. 1963):

> "But liberty is at an end if a police officer may without warrant arrest, not the person threatening violence, but those who are its likely victims merely because the person arrested is engaging in conduct which, though peaceful and legally and constitutionally protected, is deemed offensive and provocative to settled social customs and practices. When that day comes, freedom of the press, freedom of assembly, freedom of speech, freedom of religion will all be imperiled. For the exercise of each must then conform to what the conscientious policeman regards the community's threshold of intolerance to be. Consequently, as to this count, the judgment is reversed and rendered as to liability leaving open for a retrial the question of damages, compensatory and punitive."

I

Immunity

In the early history of this country in the famous case of *Marbury* v. *Madison*, 1 Cranch (U.S.) 137, involving a high-ranking officer—Secretary of State of the United States—Chief Justice Marshall, in speaking of high-ranking officials, said:

> "Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?
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> "Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained. No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone, vol. 3, p. 255, says, 'but injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; for whom the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice.'"

The foregoing language has been approved by our Supreme Court in recent times, *Bell* v. *Hood*, (1946) 327 U.S. 678, 90 L.Ed. 939, wherein Mr. Justice Black for the majority of the Court concluded:

> "Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a

federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

The immunity doctrine which the majority pronounces is based upon the conception that the complaint in this case (as described in the opinion) is vindictive, ill-founded, vexatious, or fictitious. So classifying the complaint, the majority states that the Court is left to the ". . . hard choice" of deciding whether the extremely aggravated wrongs as alleged in the complaint must remain unredressed, because of the countervailing consideration of public policy expressed in *Barr* v. *Matteo*, 360 U.S. 564, 3 L.Ed. 2d 1434 (1959). I can hardly concede that *Barr* v. *Matteo* establishes such a strong countervailing policy. In *Barr* v. *Matteo* the defendant who was head of a government agency was being sued for defamation by other government employees arising out of a dispute as to who was at fault for failure of the agency to meet certain congressional criticisms. It is fairly obvious from *Matteo* that the matters about which complaint was made resulted from ". . . the performance of acts *within the scope of official duties* . . . ." As the majority opinion states in the case at bar, this suit is not founded on any such comparatively minor complaint. Here there is alleged (as stated in the majority opinion) ". . . a conspiracy by defendants to deprive plaintiffs of the equal protection of the laws and equal privileges and immunities under the laws and to prevent and hinder state authorities from giving them equal protection." Nice distinctions are not required to grasp the difference. I agree with the opinion of the Ninth Circuit in *Hughes* v. *Johnson*, 305 F.2d 67 (9th Cir. 1962). It was decided after *Matteo* and involved the question of immunity of officers who had abridged constitutional rights:

> "The question is whether a search without warrant and unsupported by arrest, in violation of the Fourth Amendment of the United States Constitution, can be said to fall within the scope of the official duties of these appellees. In our view, it cannot, and accordingly immunity does not extend to such conduct."

The majority opinion goes into great detail in its discussion of such phrases as "scope of authority"; "the outer perimeter" of the defendants' line of duty; the performance of "a discretionary function"; "discharge of duty" and "official functions." All of these loose and evasive terms are equated with each other to arrive at the conclusion ". . . that the act must have *more or less connection with the general matters committed by law to the officer's control or supervision,* and not be manifestly or palpably beyond his authority." [Emphasis added.] The short answer to the foregoing conclusion is that no officer can *unlawfully, willfully, maliciously* and *without probable cause*—all as alleged in the complaint—deny a citizen his *constitutional rights* and then claim that the acts involved ". . . have more or less connection with the general matters committed by law to the officer's control . . ." It is a paradox to say that an unlawful, willful and malicious violation of the United States Constitution has ever, by any decree or any other authority, been "committed by law" to the control or supervision of any officer, regardless of his rank or station in the government. At the very instant a violation of the Constitution is shown by willful, malicious and unlawful acts, support of the law is removed. Such willful, malicious and unlawful conduct in violation of the Constitution can never reach the "outer perimeter" of any authority; it cannot be within the "scope of authority," and no man is given "a discretionary function" which constitutes a license to violate the most fundamental law of all—the Constitution of the United States.

II

Summary Judgments

The majority opinion has treated this case as though we were considering a common law demurrer to a complaint.[7] Both the Trial Court and the majority conclude that regardless of the allegations, the plaintiff should not be permitted an opportunity to make proof of the facts he alleges. This brings us to a consideration of summary judgments. There are certain well accepted and fundamental rules that apply to summary judgments long recognized by the courts, Fed. R. Civ. P. 56. Without undertaking to fully develop the subject, it is sufficient for our purposes here to summarize the rule. Summary judgments are granted sparingly; the moving party must clearly show that there is no genuine issue as to any material fact and that he is entitled to judgment in his favor as a matter of law. The record should clearly show what the truth is with respect to the matters complained about and it is not the purpose of the rule to deny

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7. In this case there was a motion to dismiss the complaint supported by the affidavit of the Attorney General referred to in the opinion of the majority. The plaintiffs questioned the sufficiency of the motion to dismiss and the affidavit supporting it by filing a motion to strike in which motion, among other things, it is alleged that the plaintiffs' cause of action is based upon a violation of fundamental constitutional rights and that no court or executive official has authority to grant defendants immunity from liability for the violation of such rights; that there is no such immunity; that the acts were not committed in pursuance of any legal order of any court or official; that such acts could not be within the scope of "official responsibility"; that it is not shown that the acts were committed under orders from the Attorney General; that such acts were not within the scope of the duties or authority of the defendants; and that it no where appears that the plaintiffs ever obstructed or attempted to obstruct any order of any court or official. The motion to dismiss was considered and treated as a motion for summary judgment under the provisions of Rule 12 (c), Fed. R. Civ. P.

litigants the right of trial if there is one single issue to try; the Court cannot decide factual issues but only whether there are factual issues to be decided; the probability of success of the party against whom the judgment is rendered and the fact that it is unlikely that he will prevail will not justify summary judgment action; the party seeking summary judgment has the burden of positively and clearly demonstrating that there is no issue of fact and any doubt as to the existence of such a fact issue is resolved against the movant. The moving party is not entitled to summary judgment as a matter of law even if he has technically discharged the burden resting on him; the exercise of sound discretion does not apply in granting summary judgments, but such discretion applies only in denying motions for summary judgment; and the burden is heavy on the party who seeks such a judgment. *National Screen Service Corp.* v. *Poster Exchange, Inc.*, (5th Cir. 1962) 305 F.2d 647; *Wright on Federal Courts* (1963) 385-389,[8] Summary Judgments, Asbill and Snell, 51 Mich. L. Rev. 1143.

The majority concludes that the affidavit of the Attorney General of the United States served "to make the Court's choice less difficult . . ." (meaning choice of a conclusion). The affidavit of the Attorney General was offered in support of the defendant's motion for summary

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8. Professor Wright states the rule as follows:

"Finally, it is always true that, whether or not the non-moving party has submitted affidavits or similar material, the burden is on the moving party to establish that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. The moving party is not entitled to the benefit of favorable inferences to be drawn from his moving papers. Instead the matters presented in connection with the motion must be construed most favorably to the party opposing the motion. That it may be surmised that the non-moving party is unlikely to prevail at the trial is not sufficient to authorize summary judgment against him."

judgment. We must examine the affidavit. The first noticeable defect about the affidavit is the fact that it nowhere states that the Attorney General made the affidavit based on his own personal knowledge as required by the rule. It does not state that the Attorney General was present at or near the scene four miles east of Oxford, Mississippi, when the acts complained about were committed. About the only factual statements contained in the affidavit are dates, the identity of the parties and the fact that the defendants were upon the campus of the University of Mississippi in the performance of their official duties and for the purpose of the removal of all obstructions of justice to insure that orders of the courts were executed and enforced. The majority anchors its conclusion to the statement by the Attorney General that the defendants ". . . were discharging their official government responsibilities . . ." at all relevant times and places set forth in the complaint. Again the Attorney General does not state that he knows the facts, or was present, or saw the defendants in the performance of their duties, or what they did or were required to do in order to discharge their official governmental responsibilities and he referred to no document, law, instructions, or other authority which authorized the defendants to engage in the conduct of which they are accused. Briefly stated, so far as the issues in this case are concerned, the affidavit is innocuous, inconsistent, non-factual and fails to meet the requirements of the rule dealing with summary judgments. *Mercantile Nat. Bank at Dallas* v. *Franklin Life Ins. Co.*, (5th Cir. 1957) 248 F.2d 57; *Alger* v. *United States*, (5th Cir. 1958) 252 F.2d 519; *Maddox* v. *Aetna Casualty and Surety Company*, (5th Cir. 1958) 259 F.2d 51; *Moore's Federal Practice* (2nd ed.) Vol. 6, pages 2325-30. A case of interest is *Howard* v. *Lyons*, (1959) 360

U.S. 593, decided the same day as *Barr* v. *Matteo*. In that case a naval officer was being sued by a subordinate. The party being sued was a captain in the United States Navy and Commander of the Boston Naval Shipyard. The plaintiffs were officers of a federal employees association and were civilian employees at the Boston Naval Shipyard. The suit was over alleged defamatory matter which the Captain had forwarded to the Massachusetts congressional delegation. On motion for summary judgment the Captain and his commanding officer stated in affidavits that the sending of copies of the report in question to members of the congressional delegation was a part of the Captain's official duties and that under the regulations and instructions applicable he was bound to do the very thing about which he was being sued. The question before the Supreme Court was identical with the question now before us, that is, the sufficiency of an uncontradicted affidavit. The Court concluded as to the affidavits, more detailed and conclusive than the one here in issue, as follows:

> "*Although of course such an averment by the defendant cannot foreclose the courts from examination of the question,* we think that the affidavit of petitioner's commanding officer, *and a Memorandum of Instructions* issued by the Secretary of the Navy which petitioner has with our leave filed in this Court, plainly show that the District Court was correct in finding that the circulation of the report to the Massachusetts congressional delegation was 'in the discharge of [petitioner's] . . .' official duties and in relation to matters committed to him for determination." (Emphasis added.]

It is obvious that the Memorandum of Instructions issued supported the affidavit; and it is likewise evident that the affidavits standing alone could not foreclose the courts from an examination of the question involved. In this

case it is impossible as a matter of law, for any person to produce any document, law, or other authority, which would justify the commission of the acts alleged to have been committed, or clothe the defendants with immunity. If true, the alleged acts constitute a gross violation of all law.

In my view, neither the Attorney General of the United States, nor any other person under our system of government, regardless of his position or rank, has any authority to approve the misconduct alleged by authorization, participation or ratification. The only theory upon which such conduct could be excused is the divine right of kings which presumes that personal injury from the king is impossible. Even under the doctrine of divine right, the king's helpers were not excused and as to them the law "entertains no respect or delicacy."

III

Civil Rights

By concluding that the Federal Civil Rights Statutes, 42 U.S.C.A. §1983, apply only to persons who are acting under color of *state law*, the majority concludes that since the defendants were acting under color of *federal law* they are exempted from all liability. It may be that the Civil Rights Statutes impose additional liability on persons acting under "color of law" but such statutes were never intended to grant exemptions and immunities to *state* or *federal* officers. These are not immunity statutes. The majority points to no authority, and my search fails to reveal any authority for sweeping away immunity of state police officers when they violate the civil rights of a plaintiff under the Constitution of the United States, but which grants immunity to federal officers who commit the same acts. The justification for granting immunity

would certainly run in favor of the state official, for he is called on far more often to enforce the laws, ordinances, and regulations of city, county, state, and nation than are United States marshals or other federal officials. In this connection it seems appropriate to quote from our case of *Lewis* v. *Brautigam*, (5th Cir. 1955) 227 F.2d 124, a suit against two state deputy sheriffs, a sheriff, and state's attorney of the Eleventh Judicial Circuit of Florida:

> "The complaint should not be dismissed on motion unless, upon any theory, it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts that could be proved in support of his claim."

In discussing the exemption *vel non* of public officers from liability under the civil rights acts, because of the discretionary nature of their duties, *Brautigam* states:

> "We need not, however, explore that difficult and important field of law upon the present appeal, *further than to say that a quasi-judicial officer, such as a prosecuting attorney, who acts outside the scope of his jurisdiction and without authorization of law, cannot shelter himself from liability by the plea that he is acting under color of office.* Cooper v. O'Connor, 69 App. D.C. 100, 99 F.2d 135, 138, 118 A.L.R. 1440; 43 Am. Jur., Public Officers, §277." [Emphasis added.]

The protection of life, liberty and due process, as well as affording the equal protection of the laws, are not *discretionary* governmental functions but are *constitutional guarantees*, whereby the United States has a duty to insure the protection of such rights. This is clearly shown in the case of *Logan* v. *U.S.*, 1892, 144 U.S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429,[9] where Logan and others,

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9. The decision of Logan v. U.S., 144 U.S. 263, 12 Sup.Ct. 617, 36 L.Ed. 429, has lost none of its vitality but has been ex-

United States marshals, were indicted under Sections 5508 and 5509 of the Revised Statutes (18 U.S.C. 241, 242) for conspiracy to deprive persons of their civil rights, and for murder of citizens of the United States. The Supreme Court made the following ruling (144 U.S. 263, 283-284, 12 Sup. Ct. 617, 36 L.Ed. 429, 436):

> "*The United States, having the absolute right to hold such prisoners, have an equal duty to protect them, while so held, against assault or injury from any quarter.* The existence of that duty on the part of the government necessarily implies a corresponding right of the prisoners to be so protected; and this right of the prisoners is a right secured to them by the Constitution and laws of the United States.
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> * * * *
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> (144 U.S. 264, 294, 12 S.Ct. 617, 36 L.Ed. 429, 440) "*In the case at bar, the right in question does not depend upon any of the amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action. Any government which has the power to indict, try and punish for crime, and to arrest the accused and hold them in safekeeping until trial, must have the power and duty to protect against unlawful interference of its prisoners so held, as well as its executive and judicial officers charged with keeping and trying them.*"
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> * * * *
>
> (144 U.S. 264, 295, 12 S.Ct. 617, 36 L.Ed. 429, 440) "*The United States are bound to protect against lawless violence all persons in their service or custody in the courts of the administration of justice.* This duty and the correlative right of protection are not limited

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panded under the Supreme Court's decisions in Screws v. U.S., 1944, 325 U.S. 91, 65 Sup.Ct. 1031, 89 L.Ed. 1495, and Monroe v. Pape, 1962, 365 U.S. 167, 81 Sup.Ct. 473, 5 L.Ed. 2d 492.

> to the magistrates and officers charged with expounding and executing the laws, but apply, with at least equal force, to those held in custody on accusation of crime, and deprived of all means of self-defense." [Emphasis added.]

The issue of whether the defendants were acting within the "scope of employment" is not the only issue involved; the question of whether they were acting under "color of law" is also a vital one. The Supreme Court, in the case of *Screws v. U.S.*, 1944, 325 U.S. 91, 65 Sup.Ct. 1931, 89 L.Ed. 1495, was wrestling with the constitutionality of Section 20 of the Criminal Code, which is presently 18 U.S.C. 242, and which section was originally derived from the Revised Statutes 5509 and 5510 which, in turn, were part of the original Force Acts of 1871, which civil counterparts, enacted at the same time, are presently the Civil Rights Act (42 U.S.C. 1983 and 1985). Section 20 of the Criminal Code was attacked as being too broad and nebulous to set forth a standard of guilt for a crime. The Supreme Court, speaking through Mr. Justice Douglas, held that the Court must in all instances find the statute constitutional, if possible, and the Court would do so by a narrow construction, holding that the accused Negro in the custody of the sheriff was denied his constitution right to due process of law, because the accused was killed and thus not allowed a criminal trial.

The Supreme Court, in addressing itself to the questions of what officials were held guilty of violation of constitutional rights under "color of law," held as follows in *Screws* (385 U.S. 91, 108, 65 Sup.Ct. 1031, 89 L.Ed. 1495, 1506):

> *"Some arguments which have been advanced in support of the contrary conclusions suggest that the question under Section 20 is whether Congress has made*

> *it a federal offense for a state officer to violate the law of his state. But there is no warrant for the treating of the question in state law terms.* The problem is not whether an inhabitant of a State has been deprived of a federal right by one who acts under *'color of any law.' He who acts under 'color' of law may be a federal officer or a state officer. He may act under 'color' of federal law or state law.* The statute does not come into play merely because the federal law or the state law under which the officer purports to act is violated. It is applicable when and only when some one is deprived of a federal right by that action. The fact that it is also a violation of a state law does not make it any the less a federal offense punishable as such. Nor does its punishment by federal authority encroach on state authority or relieve the state of its responsibility to punish its state offenses." [Emphasis added.]

To reach the conclusion that federal officers are likewise responsible for acting under "color of law," Mr. Justice Douglas relied upon the case of *Logan* v. *U.S., supra.*

In the case of *Monroe* v. *Pape, supra* (365 U.S. 167, 5 L.Ed. 492, 81 Sup. Ct. 473), a Negro brought suit against the city of Chicago, Illinois, and various policemen, sheriffs, justices of the peace, states' attorney, and several John Doe state officers, under 42 U.S.C. 1983, for invasion of his home, and subsequent search without a warrant, arrest and detention without a warrant and without arraignment. The United States District Court dismissed the suit on the ground that the complaint alleged no cause of action under 42 U.S.C. 1983, or under the Federal Constitution because of the individual defendants' official capacity and common law immunity. The Supreme Court, speaking through Mr. Justice Douglas, reversed the lower court and held that the invasion of the home of the plaintiff without a search warrant, the arrest and detention

without a warrant, and without arraignment, constituted deprivation of constitutional rights of the petitioner under 42 U.S.C. 1983, as the police officials were acting under "color of law" and thus swept aside any defense of immunity. Mr. Justice Douglas, in reaching such conclusion on behalf of the United States Supreme Court, relied upon his previous decision in *Screws* v. *U.S., supra* (325 U.S. 91, 89 L.Ed. 1495, 65 Sup.Ct. 1031), and held that the same interpretation of acts under "color of law" under 18 U.S. 241 and 242, applied with like force to 42 U.S.C. 1983. Here is the language of the Court (365 U.S. 167, 187, 81 Sup.Ct. 473, 5 L.Ed.2d 492, 505):

> "*We conclude that the meaning given 'under color of law' in the Classic Case and in the Screws Case and Williams Case was the correct one; and we adhere thereto.*
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> "In the Screws Case we dealt with the statute that imposed criminal penalties for acts 'wilfully' done. We construed that the word in its setting to mean the doing of an act with a 'specific intent to deprive a person of a federal right.' 325 U.S. at 103. *We do not think that gloss should be placed on Section 1979* (42 U.S.C.A. 1983) *which we have here.* The word 'wilfully' does not appear in Section 1979. Moreover, Section 1979 provides a civil remedy, while in the Screws Case, we dealt with a criminal law challenged on the ground of vagueness. Section 1979 *should be read against the background of tort liability that makes a man responsible* for the natural consequences of his actions." [Emphasis added.]

Aside from the civil rights statutes the doctrine of immunity has never been extended to exempt officers, state or federal, from liability in civil damages for the

conduct charged in this case.[10] In my view, it would be far better for the plaintiffs and the defendants alike, to have the facts with reference to the charges alleged fully developed in order to determine what the truth is, rather than to stop the plaintiffs at the threshold, denying them the opportunity of proving what they allege, and not affording the defendants an opportunity to come forward with such proof as would establish their innocence.[11] Both plaintiffs and defendants should have their day in court.

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10. *The Life and Fire Ins. Co. of N.Y. v. Adams*, 9 Peter 573, 9 L.Ed. 234 (1835); *Cooper v. O'Connor et al.*, (C.A. D.C. 1938) 99 F.2d 135, cert. den. 59 S.Ct. 146; *Wilson v. Bittinger*, (C.A. D.C. 1958) 262 F.2d 714; *Colpoys v. Foreman*, (C.A. D.C. 1947) 163 F.2d 908; *McVey v. Gross*, (D.C. N.D. Tex. 1926) 11 F.2d 379.

11. An interesting discussion of the doctrine of immunity may be found in the recent case of Wheeldin v. Wheeler, ... U.S. ....., 10 L.Ed. 2d 605. In *Wheeldin* the Supreme Court concluded that the doctrine of immunity as set forth in *Matteo* did not apply where ". . . under the allegations of the complaint respondent . . . was not acting sufficiently within the scope of his authority to bring the doctrine into play." The Court of Appeals for the Ninth Circuit had applied the doctrine of immunity. Wheeldin v. Wheeler, 302 F.2d 36 (9th Cir. 1962). It also should be observed that under *Wheeldin* state law governs the cause of action. Removal is permitted only because ". . . the interpretation of a federal defense makes the case one arising under the Constitution or laws of the United States." Citing cases. The case at bar is different from the *Wheeldin* case insofar as federal jursidiction is concerned, because in *Wheeldin* the Court concluded "in short, the facts alleged do not establish a violation of the Fourth Amendment." In the instant case, the facts alleged do establish a violation of fundamental constitutional rights.

EXHIBIT "C"

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI BILOXI DIVISION

Civil Action No. 2604

CYRIL T. FANECA, JR.,

Plaintiff,

vs.

UNITED STATES OF AMERICA ET AL.,

Defendants,

ORDER

Came on for hearing again the Motion of the Defendants, Nicholas Katzenbach and James P. McShane, to dismiss this action under Rule 56 of the Federal Rules of Civil Procedure, and requesting this Court to reconsider its order of April 1, 1963 and to issue a certificate under 28 U.S.C.A. 1292 (b), and the Court hearing argument in submission of brief, is of the opinion and does find nothing new of any convincing effect is cited in support of this unprecedented procedure, for Rule 56 motions are gravely frowned upon by the United States Circuit Court of Appeals for the Fifth Circuit, as a successful movant must show beyond every reasonable doubt the non-existence of any genuine issue of material fact and that he is entitled to a judgment in the posture of the case as a matter of law.

It is the further opinion and finding of this Court that although the plaintiff has some very burdensome obstacles

to overcome, this Court cannot say at this time, with any degree of assurance and conclusiveness, that the individual Defendants are entitled to judgment as a matter of law.

The Court is further of the opinion that this Order involves a controlling question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal from this Order may materially advance the ultimate termination of litigation.

IT IS THEREFORE ORDERED AND ADJUDGED:

(1) That the Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure is again and finally overruled for all relief requested.

(2) That the Motion for Certificate under 28 U.S.C.A. 1292 (b) should be and is hereby granted, as this Court is of the opinion that this Order involves a controlling question of law as to which there is substantial grounds for difference of opinion, and that an immediate appeal from this Order may advance the ultimate termination of this litigation.

ORDERED AND ADJUDGED, this the ..... day of August, 1963.

.....

United States District Judge

EXHIBIT "D"

Amendment I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C., 1331(a). Federal question; amount in controversy; costs

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

28 U.S.C., 1332 (a)(1). Diversity of citizenship; amount in controversy; costs

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States: * * *"

28 U.S.C., 1343 (3). Civil rights and elective franchise

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * *

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

28 U.S.C., 1346 (a)(2)(b). United States as defendant

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of: * * *

"(2)(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone

and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C., 1402 (b). United States as defendant

"(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred. As amended Sept. 2, 1958, Pub. L. 85-920, 72 Stat. 1770."

28 U.S.C., 2201. Creation of remedy

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. As amended May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub. L. 85-508, § 12(p), 72 Stat. 349."

28 U.S.C., 2674. Liability of United States

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."

42 U.S.C., 1983.

"Every person, who, under color of any statute or ordinance, regulation, custom or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceedings or redress."

CERTIFICATE OF SERVICE

I, Charles A. Carter, one of the attorneys of record for the Petitioner, do hereby certify that I have mailed, postage prepaid, two true and correct copies of the foregoing Petition for Writ Certiorari to the Solicitor General, Department of Justice, Washington 25, D. C., and I further certify that I have this day mailed, postage prepaid, special delivery to Mr. John W. Douglas, Civil Division, Department of Justice, Washington 25, D.C., one of the attorneys of record for all of the Respondents, two true and correct printed copies of the foregoing Petition for Writ Certiorari.

Done this the ..... day of July, 1964.

CHARLES A. CARTER,
CARTER AND MITCHELL,
Attorneys for the Petitioner,

.....,
CHARLES A. CARTER.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 397

CYRIL T. FANECA, JR., PETITIONER

v.

UNITED STATES OF AMERICA, NICHOLAS deB. KATZENBACH, AND JAMES P. McSHANE

No. 359 Misc.

VIRGIL NORTON, JAMES CHAPMAN, AND VIRGIL WESLEY, PETITIONERS

v.

JAMES P. McSHANE, NICHOLAS deB. KATZENBACH, JOHN DOAR, AND WILLIAM TUCKER

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (N. Pet. App. 7; F. Pet. A1–A37)[1] are reported at 332 F. 2d 855, 872.

[1] "N. Pet." and "N. Pet. App." refer to the petition and appendices in No. 359 Misc. "F. Pet." refers to the petition in No. 397.

The opinion of the district court in No. 359 Misc. (N. Pet. App. 6) is reported at 33 F.R.D. 131.

JURISDICTION

The judgments of the court of appeals were entered on June 1, 1964. A timely petition for rehearing by petitioners in No. 359 Misc. was denied on July 15, 1964. The petition for a writ of certiorari in No. 359 Misc. was filed on August 12, 1964. The petition for a writ of certiorari in No. 397 was filed on August 18, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the individual respondents were entitled to summary judgment in damage suits brought against them for acts performed by them in their official capacities while they were assisting in the execution of court orders.

2. Whether the United States is liable under the Federal Tort Claims Act for injuries resulting from the individual respondents' conduct in the execution of court orders.

STATUTE INVOLVED

28 U.S.C. 2680 provides, in pertinent part:

> The provisions of this chapter and Section 1346(b) of this title shall not apply to—
>
> (a) Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> * * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

STATEMENT

These are civil actions arising out of the government's efforts on September 30 and October 1, 1962, to enforce orders of the Court of Appeals for the Fifth Circuit and of the District Court for the Southern District of Mississippi relating to the admission and enrollment of James H. Meredith, a Negro, as a student at the University of Mississippi. Respondent Katzenbach was then Deputy Attorney General of the United States; respondent McShane was Chief of the Executive Office of United States Marshals; respondent Doar was First Assistant to the Assistant Attorney General-in-charge of the Civil Rights Division; and respondent Tucker was a Deputy United States Marshal. All were sent, along with other government personnel, to Oxford, Mississippi, to aid in the peaceful execution of the court orders directing that Meredith be enrolled at the university. See *Meredith* v. *Fair*, 305 F. 2d 343 (C.A. 5).

The facts and district court proceedings in each of the cases may be briefly summarized:

No. 397 ("Faneca").—On the evening of September 30, 1962, when Meredith was to be escorted to the university by federal officials and registered there, a large and boisterous crowd gathered around the building where the registration was to take place (R.

72a(2)).[2] Deputy United States Marshals were stationed on the premises since it was anticipated that local officials would be unprepared to keep order during the registration (R. 54a–55a; McShane deposition 17–28). In addition, the President of the United States, by Executive Order, had directed the Secretary of Defense "to take all appropriate steps to enforce all orders" of the court of appeals and the district court pertaining to Meredith's admission, Executive Order No. 11053, 27 Fed. Reg. 9693.

At approximately 8:00 p.m. on September 30 the crowd, which had been boisterous, became violent and began to advance towards the university building and the marshals who were guarding it (R. 77a, 80a–82a). Respondent McShane, who was in charge of the force of marshals, thereupon ordered them to fire tear gas in order to disperse the mob (R. 59a, 79a). Petitioner, who was a student at the university, had first arrived on the scene at approximately 6:45 p.m. and then joined the crowd, which was yelling and flicking cigarette butts at the marshals (R. 88a–91a). When the tear gas was fired shortly after 8:00 p.m., petitioner and a female companion left the area. Petitioner then circled the building and reached a point at its northwest corner. A group of marshals approached him there and allegedly fired tear gas at him over his protest (R. 102a–106a).[3]

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[2] "R." refers to the respondents' appendix in the court of appeals, which contains the affidavits and depositions filed in the district court in *Faneca*, and which we have filed with the Clerk of this Court.

[3] In his deposition, petitioner testified that after the tear gas was fired, he and his companion left the campus and went to

Petitioner brought suit in the United States District Court for the Southern District of Mississippi against the United States and the individual respondents under the Federal Tort Claims Act, 28 U.S.C. 1346(b), and the Civil Rights Act, 42 U.S.C. 1983, alleging that the tear gas had been fired at him "wrongfully and negligently," and that respondents' conduct had violated his constitutional rights of assembly and speech and deprived him of liberty without due process of law. The district court denied respondents' motion for summary judgment, but certified the case for interlocutory appeal under 28 U.S.C. 1292(b).

No. 359 Misc. (*"Norton"*).—Petitioners, who are residents of Pike County, Alabama, were arrested on October 1, 1962, while riding in an automobile approximately four miles east of Oxford, Mississippi.[4] Subsequently, they brought suit in the Circuit Court of Lafayette County, Mississippi, alleging that after

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a restaurant. He returned to the building where the registration took place at about midnight, and remained there until 1:00 a.m. He did not consult a physician or seek treatment at a hospital or at the university's infirmary. He did, however, take aspirin for relief of a headache (R. 107a; Faneca deposition pp. 13–18, 52–60).

[4] In its present posture the record does not clearly reflect the reason for petitioners' arrest. It is relevant, however, to note that prior to instituting suit, petitioners Chapman and Norton filed motions in the United States District Court for the Northern District of Mississippi for the return of weapons taken from them at the time and place of their arrest and for the suppression of these weapons as evidence. The weapons were three shotguns and a 22-calibre Baretta pistol. The district court denied these motions on May 9, 1963. *Chapman* v. *United States*, Civil No. W-M-16-62; *Norton* v. *United States*, Civil No. W-M-17-62.

being arrested they had been confined in a small building for at least 18 hours, during which time they were given no food or drink and were not permitted to speak. As a result of this and other alleged mistreatment, petitioners contended that respondents had committed false arrest and assault and battery, and had conspired to deprive petitioners of the equal protection of the laws.

On motion of respondents, the case was removed to the United States District Court for the Northern District of Mississippi. Respondents then filed an affidavit of the Attorney General stating that "at all relevant times and places set forth in the complaints" respondents "were discharging their official governmental responsibilities," and moved for dismissal. The district court, treating the motion as one for summary judgment, entered summary judgment for respondents on the ground that they were immune from suit since at the times and places alleged in the complaints respondents were "engaged in the performance of their official duties, including the execution and enforcement of orders of the United States District Court for the Southern District of Mississippi and the United States Court of Appeals for the Fifth Circuit" (N. Pet. App. 6).

The court of appeals heard both cases together. It directed the entry of summary judgment in *Faneca* and affirmed the entry of summary judgment in *Norton*. Judge Gewin concurred in the dismissal of the claim against the United States in *Faneca*, but dissented in both cases with respect to the claims against the individual respondents.

ARGUMENT

The court of appeals correctly concluded that on the uncontradicted facts of all these cases the individual respondents were acting within the scope of their official duties and that they were, therefore, immune from liability under a consistent course of decisions of this Court culminating with *Barr* v. *Matteo*, 360 U.S. 564, and *Howard* v. *Lyons*, 360 U.S. 593. The court of appeals was also correct in determining that the United States was not subject to liability under the Federal Tort Claims Act for conduct such as that involved here. The decisions of the court of appeals do not conflict with decisions of any other courts of appeals or of this Court; nor do they raise any significant question of law warranting review by this Court.

1. Affidavits by Attorney General Kennedy were filed in both *Faneca* and *Norton*. The affidavits stated that on September 30 and October 1, 1962, the individual respondents were "at my direction * * * upon the campus of the University of Mississippi in the performance of their official duties." According to the affidavits, respondent Katzenbach "supervised and directed all United States Marshals and their deputies in the performance of their official duties, including the execution and enforcement of all lawful orders entered by the United States District Court for the Southern District of Mississippi and the United States Court of Appeals for the Fifth Circuit, and the removal of all obstructions of justice to insure that said orders of the Courts were executed and enforced." Respondent McShane was similarly assigned "at [the

Attorney General's] direction" to assist in the enforcement of the court orders "and the removal of all obstructions of justice to insure that said orders of the Courts were executed and enforced." Respondents Doar and Tucker were also directed by the Attorney General to assist at the university and were, according to the affidavits, "discharging their official governmental responsibilities" at the times and places alleged in the complaints (N. Pet. App. 4; R. 45a–46a).[5]

Here, as in *Howard* v. *Lyons*, 360 U.S. 593, 597, the district courts had before them "uncontradicted affidavits" that the acts which were allegedly tortious were committed in the discharge of respondents' official duties. Accordingly, summary judgment was the appropriate means of guaranteeing the privilege from suit which, as this Court observed in *Barr* v. *Matteo*, 360 U.S. at 572–573, constitutes "an expression of a policy designed to aid in the effective functioning of government." It is no less true in the present circumstances than it was in *Barr* v. *Matteo* "that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which

[5] The contention made by petitioners in *Norton* that the Attorney General's affidavit could not be relied upon because it was not based on personal knowledge (N. Pet. 15–16) obviously raises no significant issue of law. Moreover, no objection on that ground was made in the district court. See, *e.g.*, *Mitchell* v. *Dooley Bros. Inc.*, 286 F. 2d 40, 42 (C.A. 1), certiorari denied, 366 U.S. 911; *Klingman* v. *National Indemnity Co.*, 317 F. 2d 850, 854 (C.A. 7).

would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." 360 U.S. at 571. Indeed, the present case is more compelling than *Barr* v. *Matteo* because the allegations here did not primarily charge the government officials with having acted out of malice.[6] Hence, recognizing the immunity asserted here by the individual respondents would not amount—as did the immunity in *Barr* v. *Matteo*—to recognition of an "absolute" privilege, but only to "protection against the consequences of * * * honest mistakes." 360 U.S. at 588 (Brennan, J., dissenting).

The decisions in *Barr* v. *Matteo, supra,* and *Howard* v. *Lyons, supra,* accorded with the well-established principle that a federal official cannot be held personally liable for an act which is committed within the general scope of his official authority and in pursuance of his official duties. See *Spalding* v. *Vilas,* 161 U.S. 483; *Alzua* v. *Johnson,* 231 U.S. 106; *Yaselli* v. *Goff,* 275 U.S. 503. The principle has been applied in a considerable number of cases involving different officials under varying circumstances,[7] and it was properly applied here. As the court of appeals observed, "the selection of a proper method of enforcing

[6] In *Norton* the petitioners did allege at one point in their complaint that the "Defendants acted maliciously and were guilty of a wanton disregard of the rights and feelings of Plaintiff" (N. Pet. App. 1, p. 3). But the remainder of the complaint did not charge malicious conduct.

[7] See, for example, the many cases cited in footnote 5 of the court of appeals' opinion in *Norton* (N. Pet. App. 7, pp. 5–6; F. Pet. A 13).

a court's orders in the face of active opposition and obstruction is a decision which it is necessary that these officers be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability" (N. Pet. App. 7, p. 9; F. Pet. A 17).

2. The court of appeals was also correct in its alternative holding that 42 U.S.C. 1983 does not apply to persons acting under color of federal law. The statute expressly provides for liability with respect to "[e]very person who, under color of any statute, ordinance, regulation, custom or usage, of *any State or Territory* * * *" subjects anyone to the deprivation of constitutional rights. (Emphasis added.) There is no reason to read a statute "so plainly limited" to acts done under color of State law (*Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (C.A. 2), certiorari denied, 339 U.S. 949) as applicable to acts committed under color of federal law.[8]

3. The court of appeals properly dismissed petitioner Faneca's action against the United States under the Federal Tort Claims Act. Insofar as the claims made in these suits were essentially claims for assault and battery or false imprisonment, they were excepted from the coverage of the Federal Tort Claims Act by

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[8] The comparable criminal Civil Rights Act provision, 18 U.S.C. 242, on which petitioner Faneca relies (F. Pet. 13–15), applies to persons acting "under color of *any* law." Cases such as *Screws* v. *United States*, 325 U.S. 91, and *Logan* v. *United States*, 144 U.S. 263, are, therefore, inapplicable. Similarly inapposite are *Monroe* v. *Pape*, 365 U.S. 167, and *Nesmith* v. *Alford*, 318 F. 2d 110 (C.A. 5), certiorari denied, 375 U.S. 975, which were suits against State officers acting under color of *State* law.

28 U.S.C. 2680(h). See p. 3, *supra*.[9] To the extent that the orders given by respondents Katzenbach and McShane regarding the firing of the tear gas and the selection of "unskilled, immature, or unseasoned" marshals (R. 15a) were allegedly negligent, the Federal Tort Claims Act is inapplicable because of the "discretionary function" exception of 28 U.S.C. 2680 (a) (p. 2, *supra*). As this Court observed in *Dalehite* v. *United States*, 346 U.S. 15, 36, "Where there is room for policy judgment and decision there is discretion." The present case involved a clear instance of the exercise of "policy judgment" which had been delegated by the Attorney General to his on-the-scene representatives, respondents Katzenbach and McShane.

CONCLUSION

For the reasons stated, we respectfully submit that the petitions for writs of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
JOHN W. DOUGLAS,
Assistant Attorney General.
SHERMAN L. COHN,
MARTIN JACOBS,
Attorneys.

SEPTEMBER 1964.

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[9] See *Lewis* v. *United States*, 194 F. 2d 689 (C.A. 3) (use of excessive force by military sentry within assault and battery exception); *Stepp* v. *United States*, 207 F. 2d 909 (C.A. 4), certiorari denied, 347 U.S. 933 (use of excessive force by army guard within assault and battery exception); *Alaniz* v. *United States*, 257 F. 2d 108 (C.A. 10) (shooting of apparent suspect by deputy sheriff within assault and battery exception); *Klein* v. *United States*, 268 F. 2d 63 (C.A. 2) (exposure of individual to chill and elements and mental indignity by FBI agents and customs officers within assault and battery exception).

U.S. GOVERNMENT PRINTING OFFICE 1964

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SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS

The purpose of this memorandum is to invite the Court's attention to a recent decision of the Court of Appeals for the First Circuit, *Kelley* v. *Dunne* (C.A. 1, Nos. 6390, 6391, 6406; March 11, 1965).[1] The court of appeals there stated that its decision was contrary

[1] For the convenience of the Court, we have set forth that decision as an Appendix to this memorandum.

to the decision of the Court of Appeals for the Fifth Circuit in *Norton* v. *McShane* (No. 359 Misc.). We set forth below our reasons for believing that there is in fact no conflict of decisions and no occasion to grant the instant petitions.

1. The *Kelley* decision involves suits growing out of a search of the Kelley residence, conducted by a postal inspector investigating a mail robbery. Mrs. Kelley sued for trespass, assault and battery and false imprisonment, alleging that the postal inspector entered the household without a warrant and restrained Mrs. Kelley from interfering with the search and from leaving the house. Mr. Kelley sued for the return of certain property (currency, money bags and some rope) removed by the inspector and for defamation. He alleged, as to the latter claim, that the inspector had told Mrs. Kelley that her husband had committed a previous mail robbery and was suspected of the one then under investigation. Upon undisputed affidavits by the inspector and his superior that the search was made pursuant to his duties, the district court entered summary judgment in each action in favor of the postal inspector.

Accepting the allegations of the complaint as true for the purposes of its decision, the court of appeals reversed and remanded for further proceedings.[2] It

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[2] The record, we note, contained a deposition by the postal inspector in which he denied that he touched or otherwise restrained Mrs. Kelley and asserted that she had consented to the entry and search. This deposition was not reproduced in the printed record on appeal and may have been overlooked by the court of appeals. We intend to call the First Circuit's

set forth three conditions which, in its view, must appear before an official is entitled to absolute immunity: (1) that "the conduct of the defendants * * *, viewed without reference to the defendants' alleged motives, was within the normal scope of their agency powers"; (2) that "the activity of the defendant was prima facie in accordance with his duties and customary behavior"; and (3) that the public interest involved outweigh the private interest allegedly being interfered with (App. 7a–8a). Applying these tests to the allegations in the *Kelley* case, the court concluded that the postal inspector was not entitled to absolute immunity but could claim only a qualified or conditional privilege—*i.e.*, immunity only in the absence of malice.

While the court did not specify to which of the actions before it the Fifth Circuit's decision in the *Norton* case was thought to be contrary, it seems clear that it had in mind Mrs. Kelley's action for trespass, assault and battery, and false imprisonment. Mr. Kelley's suit for return of property turned on the application of principles governing unconsented suits against the United States over disputed property (*e.g.*, *Malone* v. *Bowdoin*, 369 U.S. 643), rather than upon the principles of official immunity for allegedly tortious conduct (*e.g.*, *Barr* v. *Matteo*, 360 U.S. 564). And while Mr. Kelley's action for defamation did involve the doctrine of official immunity, neither its

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attention to the deposition in a petition for rehearing, and to contend that the district court's grant of summary judgment was accordingly correct. Rule 56(e), as amended, Fed. R. Civ. P. 2.

facts nor the type of conduct involved bears any resemblance to those in *Norton*.

2. Putting aside the question whether the *Kelley* case was correctly decided, we submit that there is no conflict among the circuits. The factual circumstances in the instant cases are of an entirely different order from those in *Kelley*. Indeed a proper application of the standards laid down by the First Circuit to the facts at bar would produce the same result reached by the court below.

The conduct at issue here was undertaken to overcome active obstruction to the lawful orders of a federal district court; it is thus a classic example of the type of case in which the courts have given the doctrine of official immunity—which had its inception in cases involving threats to the judicial process (*Bradley* v. *Fisher*, 13 Wall. 335)—its clearest and most liberal application. *E.g.*, *Spruill* v. *O'Toole*, 74 F. 2d 559 (C.A.D.C.), certiorari denied, 294 U.S. 707 (United States marshal immune from liability for conduct during execution of court order); *Yaselli* v. *Goff*, 12 F. 2d 396 (C.A. 2), affirmed, *per curiam*, 275 U.S. 503 (suit against special assistant to the Attorney General for malicious prosecution);[3] *Barr* v. *Matteo*, 360 U.S. 564, 569. The *Kelley* case, on the other hand, involved a routine investigation by a

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[3] In *Yaselli* v. *Goff*, the Second Circuit stated (12 F. 2d at 406):

"The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions."

postal inspector; the need for the protection afforded by the immunity doctrine is far less acute in such a case.

Petitioners here are challenging the exercise of judgment by ranking law enforcement officials as to how the court's injunctions might be enforced and the issuance of discretionary orders for that purpose.[4] Such policy-making functions are the very kind of discretionary conduct that the immunity doctrine is particularly designed to protect. By contrast, the *Kelley* case involved conduct at the operational level—allegedly tortious conduct by the postal inspector himself. The doctrine of official immunity has a narrower scope when applied to levels of conduct where the element of discretion either is slight or altogether absent. *Barr* v. *Matteo*, 360 U.S. 564, 573;[5] cf. *Hughes* v. *Johnson*, 305 F. 2d 67 (C.A. 9).

Moreover, it can scarcely be denied that the conduct at bar "viewed without reference to the defendants' alleged motives, was within the normal scope of their agency powers" (App. 7a) when it is ap-

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[4] While the complaint in *Norton* alleged that the defendants had themselves done the physical acts in question, the Attorney General's undisputed affidavit established that the defendants were in a different place at the time, leaving only the complaint's allegation that they had "caused" the acts to be done.

[5] In *Barr* v. *Matteo*, 360 U.S. 564, 573, the Court said: "To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails."

preciated that those powers were being exercised to secure the enforcement of court orders as against active obstruction. Similarly, it is plain that "the activity of the [respondents] was prima facie in accordance with [their] duties" (App. 7a), when the exigent circumstances in which those duties had to be performed are taken into account.

Finally, consideration of "the relative weight of the competing interests" (App. 8a) manifestly calls for immunity here. The public stake in the orderly enforcement of court orders is fundamental in a democratic society. In the cases at bar, the challenged conduct consisted of discretionary instructions of public officials who were seeking to enforce a district court order in the midst of physical opposition and threatening violence. In such circumstances, the public interest certainly outweighs any private interest allegedly interfered with by the respondents; any other conclusion would, in the words of the First Circuit (App. 8a), result in a "serious hamstringing" of the most vital activities of our principal public officials.

CONCLUSION

For the foregoing reasons, and those set forth in our brief in opposition, we respectfully submit that the petitions for writs of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

MARCH 1965.

APPENDIX

United States Court of Appeals
For the First Circuit
No. 6390
JOHN J. KELLEY, PLAINTIFF, APPELLANT,
v.
RAYMOND J. DUNNE, DEFENDANT, APPELLEE;
No. 6391
SAME,
v.
SAME;
No. 6406
ELIZABETH-ANN KELLEY,
PLAINTIFF, APPELLANT,
v.
WILLIAM F. WHITE ET AL.,
DEFENDANTS, APPELLEES.
APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
Before WOODBURY, Chief Judge, and HARTIGAN and ALDRICH, Circuit Judges.

Opinion of the Court

March 11, 1965

ALDRICH, *Chief Judge.* These three cases against two defendants, although not heard together either in this court or in the court below, involve sufficient similarities to merit treatment in one opinion. Each was brought in the state court and removed to the district court by the defendant pursuant to 28 U.S.C.

§ 1442(a)(1). In each the defendant thereafter filed an affidavit, moved for, and obtained, a summary judgment in his favor. In one case the plaintiff filed a counteraffidavit. In reciting the facts we exclude, of course, those which were so contradicted. We will also, to simplify the presentation, speak in terms of one defendant, since both had similar positions and duties, and were similarly engaged.[1] On that basis the presently assumed facts were these.

In October 1962, the defendant came to the home of the two plaintiffs, Mr. and Mrs. Kelley. The defendant was a United States postal inspector, duly assigned to and then engaged in the investigation of a mail robbery that had occurred some weeks before in Plymouth, Massachusetts. Under 39 U.S.C. §§ 3523 (a)(2) (C) and (K) he had authority to investigate, develop evidence, locate witnesses, and make arrests. Mr. Kelley was out; Mrs. Kelley was at home. In order to gain admission he told her, falsely, that he had a warrant authorizing him to search the premises and, again falsely, that there was a warrant outstanding for the arrest of Mr. Kelley for a robbery five years before in Ohio, and that Mr. Kelley was suspected of complicity in the Plymouth robbery. He "did place his hands" upon Mrs. Kelley, and by "force and the threat of physical force * * * restrained her * * * ." Although in legal terms assault, battery and false imprisonment, this conduct towards Mrs. Kelley was not such that it would have been excessive if in fact defendant had had a search warrant.

It is, we take it, conceded that defendant had no personal ill will against either Mr. or Mrs. Kelley, and

[1] Strictly, one defendant was the other's superior, but the other was acting under his instructions.

that his only purpose was to carry out what he conceived to be his duties. However, it is specifically alleged in one of the cases that he knew that no warrants had been issued, either in Ohio, or in connection with this search. The government filed a single brief in all three cases and drew no factual distinction between them either there or in oral argument. Since these are motions for summary judgment requiring construction in plaintiff's favor we think it would be inappropriate for us to assert a distinction ourselves. Hence we will assume in all cases that defendant knew that no warrants existed.

The defendant's search discovered some U.S. currency, and two cloth money bags, which he took away with him over Mrs. Kelley's objections. According to his uncontradicted affidavit these items are now "held by the United States Post Office * * * in connection with the investigation of the [Plymouth] * * * robbery."

The cases thus stand that defendant postal inspector, engaged in investigating a mail robbery, and, in particular, plaintiff Kelley's possible connection therewith, did four things which he could lawfully have done under certain circumstances, none of which circumstances existed; viz., defendant stated to Kelley's wife in order to obtain entry that he had a warrant charging Kelley with robbery; entered and searched Kelley's house; restrained Kelley's wife from interfering with the entry and search; and took away certain property. Defendant contends, and the district court found, that as matter of law plaintiffs nevertheless cannot recover.[2]

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[2] The opinion in the husband's suit for slander appears at 230 F. Supp. 969, and in his action for return of the personal property at 230 F. Supp. 986.

767-382—65——2

At first blush it would seem that if personal interests are invaded without lawful excuse, such as a search warrant, hot pursuit, or consent, there should be a civil remedy. However, it has long been recognized that in some circumstances where a public interest is involved this interest may be paramount. The classic statement of the principle was given by Judge Learned Hand in *Gregoire* v. *Biddle,* 2 Cir., 1949, 177 F. 2d 579, 581, *cert. den.* 339 U.S. 949.

> "The justification for [denying recovery] * * * is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."

A long line of decisions has, both before and since, recognized that in many instances "the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits based on acts done in the exercise of their official responsibilities" outweighs "the protection of the individual citizen against damages caused by oppressive or malicious action on the part of public officers." *Norton* v. *McShane,* 5 Cir., 1964, 332 F. 2d 855, 857, *petition for cert. pending.*[3]

Gregoire v. *Biddle, supra,* was a personal action against the Attorney General and a number of other public officials asserting that the plaintiff had been imprisoned, on their order, as an enemy alien when

[3] Whether we agree with the actual decision in this case we will consider later, but this statement we accept.

in point of fact he was not such; that defendants' conduct was "without any reasonable or colorable cause" and was, accordingly, malicious and wilful. The court, interpreting this to mean not only that defendants lacked grounds for belief, but did not in fact believe that he was such an alien, nonetheless held that the complaint stated no cause of action.

Except to the extent that the court cited the principle of judicial and prosecutorial privilege, *Gregoire* relied upon *Spalding* v. *Vilas,* 1896, 161 U.S. 483. There the defendant Postmaster General had delivered compensation checks to claimants with the statement that the payments were being made direct because of a Congressional requirement, and added a comment suggesting that the reason for this requirement was that the services rendered by their attorney had been unnecessary. Plaintiff alleged that this addition was false and was made maliciously for the purpose of indicating that plaintiff, who was their attorney, was rendering bills for services when he had performed no services, and thus to defame plaintiff, and to induce breaches of contract. The court said, at p. 498, "As in the case of a judicial officer, we recognize the distinction between action taken by the head of a Department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision." It concluded that the defendant "cannot be held liable to a civil suit for damages on account of official communications made by him pursuant to an act of Congress, and in respect of matters within his authority, by reason of any personal motive which might be alleged to have prompted his action; for

personal motives cannot be imputed to duly authorized official conduct."

The defendant, in other words, was an officer authorized to make communications, and whereas it may have been that what he stated was wrong, it was not on its face something he should not have stated, and a cause of action cannot be created by asserting that the defendant had a malicious motive.

In *Barr* v. *Matteo,* 1959, 360 U.S. 564, the court held that a complaint which alleged that a public official making a public statement about another official which he was not "required" to make, but which he had "discretion" to make, must fail even though it was alleged that the defendant acted from spite and knew that what he was saying was false.[4] Correspondingly, in *Howard* v. *Lyons,* 1959, 360 U.S. 593, decided the same day, the court recognized absolute immunity for a discretionary publication by another public official. In this instance Justice Harlan spoke for a majority of the court.

Taking these cases collectively,[5] the principle is established that free and untrammeled behavior of certain government representatives is so important to the public welfare that, within limits, they should not be exposed to liability for damages by charges of im-

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[4] Only four justices joined in Justice Harlan's opinion. However, Justice Stewart accepted the "persuasive analysis of the principles," and dissented only from their particular application. (This dissent did not carry the day because Justice Black concurred in the result reached by the four justices, but felt the opinion did not go far enough.)

[5] *Gregoire* v. *Biddle* is not a Supreme Court decision, but in addition to being considered a landmark by other lower courts, it appears to be so regarded by the Supreme Court. See *Barr* v. *Matteo, supra,* at 571–72; *Garrison* v. *Louisiana,* 1964, 379 U.S. 64, 75.

proper motives, or of conscious wrongdoing.* The difficulty is the extent of the principle. We may note, however, certain common denominators. In the first place the conduct of the defendants in all cases, viewed without reference to the defendants' alleged motives, was within the normal scope of their agency powers. A second common denominator is that the activity of the defendant was prima facie in accordance with his duties and customary behavior. It is usual for an attorney general to take procedural steps to enforce the statutes, for a disbursing officer to explain the circumstances of a payment, for an information officer to give out information. While no act can ever be judged in vacuo, but only with some measure of reference to external circumstances, some actions require very little showing in order to appear at least prima facie justified, while others need elaborate support. Paradoxically it would seem that it is in the latter situation that there is less need for the immunity doctrine. In the latter case, where an officer knows that he is acting out of the ordinary, he is on notice of the circumstances, and there is more reason for him to have to expect to be prepared to justify his conduct. This is far less of a burden than if he had to be constantly on guard in every routine case of customary activity.

Thirdly, since the doctrine of absolute immunity is based upon the relative importance of the public, as

*There may, of course, be a distinction between improper motive and conscious wrongdoing. A man may say or do what he believes to be correct, but have been induced to take the action solely because of spite or personal ill will. In the law of defamation such matters may be important. *Cf. Hartmann* v. *Boston Herald-Traveler Corp.*, 1948, 323 Mass. 56, 59, 65; *Brewer* v. *Second Baptist Church*, 1948, 32 Cal. 2d 791, 197 P.2d 713, 718. See generally Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 929–31.

against a private, interest, application of the doctrine must vary with the relative weight of the competing interests. In the cases in which private rights have been foreclosed, free exercise of the public function has been considered highly important.

Applying these principles to the cases at bar there would seem a substantial difference between a public information officer uttering a defamatory statement in the course of an official announcement, for example, and a postal inspector making a search without, so far as presently appears, consent or a warrant or belief that there was a warrant, and volunteering slander. The public need to protect such conduct, or conduct difficult to separate therefrom, is minimal. In the case of the head of an agency it is not only appropriate and customary to make releases, but his entire function would be basically circumscribed if danger of liability existed. The uttering of defamation by a postal inspector, on the other hand, without the assurance of a warrant, or, indeed, the making of the search itself without a warrant, is, or should be, the unusual case.[7] There would be no serious hamstringing of the activities of postal inspectors if, in the absence of a warrant, they were obligated, to some extent, to defend their actions.[8] In such a situation we see no compelling need to superimpose, absolutely, the public interest upon private rights. *Cf. Hughes* v. *Johnson,* 9 Cir., 1962, 305 F. 2d 67; *Colpoys* v. *Gates,* D.C. Cir., 1941, 118 F. 2d 16; *Kozlowski* v. *Ferrara,* D.C.S.D.-N.Y., 1954, 117 F. Supp. 650; *Ampey* v. *Thornton,* D.C.D. Minn., 1946, 65 F. Supp. 216.

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[7] We need hardly add that obtaining consent to enter without a warrant by deliberate misrepresentation would not advance any governmental purpose.

[8] The standard we adopt is conduct which is reckless or worse. See infra.

Admittedly the recent case of *Norton* v. *McShane*, 5 Cir., 1964, 332 F. 2d 855, *petition for cert. pending*, is contra. We are unable to follow it. Indeed, we find ourselves unable to see why federal investigatory officers should be given absolute immunity for trespass under circumstances where, had they been state officials, they might have found themselves personally responsible under an act of Congress. *Cf. Monroe* v. *Pape*, 1960, 365 U.S. 167. The defendant cites *Swanson* v. *Willis*, D.C.D. Alaska, 1953, *aff'd on the opinion below*, 9 Cir., 1955, 220 F. 2d 440. If there is any force left in that case after *Hughes* v. *Johnson*, 9 Cir., 1962, 305 F. 2d 67, we do not agree with it.

The defendant did not suggest here or, apparently, in the district court, that he had a conditional privilege which, on the record, entitled him to judgment. However, if only for the purpose of further proceeding, we will deal briefly with that subject. As a public official engaged in the performance of his duty it is clear that the defendant had a conditional privilege if he did not have an absolute one. Such a privilege is a defense until "malice" is shown, the burden being on the plaintiff. However, malice in this sense means something broader than personal ill will; it means an "abuse" of the privilege. *Sheehan* v. *Tobin*, 1950, 326 Mass. 185. Or, as the Massachusetts court put it in a recent personal action against a public official, the privilege is lost upon proof of "actual malice * * * or * * * reckless indifference to the rights of the individual citizen." *Vigoda* v. *Barton*, 1965 Mass. A.S. 223. See also opinion of Judge, now Justice, Stewart in *A.B.C. Needlecraft Co.* v. *Dun & Bradstreet, Inc.*, 2 Cir., 1957, 245 F. 2d 775, at 777, "'malice' required to destroy the privilege does not alone mean actual malice * * * [but] can also consist of 'such a wanton and reckless disregard of the

rights of another as is ill will's equivalent.'" *Cf. H. E. Crawford Co.* v. *Dun & Bradstreet, Inc.*, 4 Cir., 1957, 241 F. 2d 387, 395. Entry upon private premises, without consent, on the assertion of a warrant, knowing that there is none, would seem to us a prime example of reckless indifference to the rights of the individual citizen however devoted the officer may, mistakenly, feel to what he considers his duty. So also, of course, is the uttering of defamatory statements which are known to be false. Any higher requirement for destruction of the conditional privilege would permit any officer, who was sufficiently ingenuous or zealous, to ride roughshod as "duty" called.

Lest we be misunderstood, we do not hold the officer to the same standard with respect to personal liability as we would the government in testing the validity of its actions. For example, a search made with a warrant supported by what is subsequently determined to be an insufficient affidavit is illegal. We would not suggest that the officer's personal liability is so easily established. *Hunt* v. *Evans*, D.C. Cir., 1926, 10 F. 2d 892. An error in constitutional interpretation, or in concluding what are "reasonable grounds to believe" may be fatal to the government's position, but not to the officer's. Unreasonableness and recklessness are by no means equivalent. *Vigoda* v. *Barton, supra.*

We will deal briefly with the action for the return of the money and personal property. The district court, properly construing the defendant's affidavit in favor of the plaintiff, did not treat the property as being no longer in the defendant's possession. It did, however, regard it as also in the government's possession, citing *Malone* v. *Bowdoin*, 1962, 369 U.S. 643. It quoted from page 647 of that opinion.

> "* * * the action of a federal officer affecting property claimed by a plaintiff can be made

> the basis of a suit for specific relief against the officer as an individual only if the officer's action is 'not within the officer's statutory powers or, if within those powers, only if the powers or their exercise in the particular case are constitutionally void. * * *' Since the plaintiff had not made an affirmative allegation of any relevant statutory limitation upon the Administrator's powers, and had made no claim that the Administrator's action amounted to an unconstitutional taking, the Court ruled that the suit must fail as an effort to enjoin the United States."

It seems to us that the court drew the inapposite conclusion from the language quoted. Since the property here was taken by the defendant without warrant or present semblance of probable cause it must follow that it was an "unconstitutional taking." See *Mapp* v. *Ohio,* 1961, 367 U.S. 643; *Berkowitz* v. *United States,* 1 Cir., 1965, 340 F. 2d 168.

The judgments of dismissal must be vacated and the cases returned for further proceedings consistent herewith.

WOODBURY, *Senior Circuit Judge* (by designation), Concurring. The rule developed and extended in recent cases excluding evidence illegally obtained affords direct protection to the guilty. But the rule protects the innocent person whose premises are illegally but fruitlessly ransacked, and perhaps left a shambles, only indirectly through its supposed [1] tendency to discourage official excesses. I recognize the danger of groundless actions and consequent dampening of official zeal. However, I see no reason why the innocent should not have direct protection as well as the guilty by the only means available to them, that

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[1] See Dash, *Cracks in the Foundation of Justice,* 46 Ill. L. Rev. 385, 391 (1951). See also Burgher, *Who Will Watch The Watchman?* 14 Am. U. L. Rev. 1 (1964).

is, by an action against the officer responsible for the wrong. However, I would not destroy a federal officer's privilege altogether by making him broadly answerable in damages for the "reasonableness" of his conduct. The law relating to searches, seizures and arrests is today so technical and refined that a federal officer can all too readily make an honest error of constitutional law. I would go no further than to cut down an officer's privilege or immunity from absolute to qualified or conditional by permitting an action against him but only on a clear showing of "malice, corruption, or cruelty."[2] to which I would add ruthless indifference to a citizen's rights.

Thus in my view an officer-defendant would win on motion for summary judgment unless the plaintiff could come up with solid evidence first that the officer's action was not within the outer perimeter of his powers and second that his action was taken in "bad faith," using that term as shorthand for the elements essential for liability I have enumerated above. See Hart & Wechsler, The Federal Courts and the Federal System, 1220–21 (1953). In short, I think to be actionable an officer's conduct should not only be in excess of his powers but also inspired by "bad faith" as I use the term. Summary judgment would therefore afford a defendant protection from ill founded actions, as pointed out by Mr. Justice Brennan in his

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[2] See *Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 88, 129 (1849), where the Court wrote:

"* * * a public officer, invested with certain discretionary powers, never has been, and never should be, made answerable for any injury, when acting within the scope of his authority, and not influenced by malice, corruption, or cruelty."

dissent in *Barr* v. *Matteo,* 360 U.S. 564, 589 (1959), thereby minimizing the deterrent effects upon official action envisaged by the late Judge Learned Hand in *Gregoire* v. *Biddle,* 177 F. 2d 579, 581 (C.A. 2, 1949), *cert. denied,* 339 U.S. 949.

Application of the principle I advocate would result in reversal of the judgments of the court below, for as the case now stands there is evidence that the defendant acted with reckless indifference by resorting to defamation to gain his ends. I concur.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 397

CYRIL T. FANECA, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA, NICHOLAS DE B. KATZENBACH, AND JAMES P. McSHANE,
Respondents.

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I.

We have read, with great interest, the Supplemental Memorandum for the Respondents as the same pertains to the recent decision of the United States Court of Appeals for the First Circuit, *i.e. Kelley* v. *Dunne,* (Nos. 6390, 6391, 6406, March 11, 1965), for this Circuit, just as did the United States District Court for the Southern District of Mississippi, recognized that which the United States Court of Appeals for the Fifth Circuit failed to, viz.:

That the claims asserted by the respondent, Cyril T. Faneca, Jr., are *for denial of constitutional rights,* not assault and battery.

II.

The Respondents, in a lame effort, seek to minimize the thrust of the *Kelley* case by stating:

1. That Mrs. Kelley's action for trespass, assault and battery, and false imprisonment, was the distinguishing feature as between the decision in the *Kelley* case and that rendered in the *Norton* and *Faneca* cases.

2. That, regardless, there is "* * * no conflict among the circuits. The factual circumstances in the instant cases are of an entirely different order from those in *Kelley.*"

For the Court to fully appreciate the complete inaccuracy of these statements, we must first view exactly what the United States Court of Appeals for the First Circuit had to say in the *Kelley* case, as shown in Respondent's Brief, 9a-10a, to-wit:

"Admittedly the recent case of Norton v. McShane, 5 Cir., 1964, 332 F.2d 855, petition for cert. pending, is contra. We are unable to follow it. Indeed, *we find ourselves unable to see why federal investigatory officers should be given absolute immunity for trespass under circumstances where, had they been state officials, they might have found themselves personally responsible under an act of Congress.* Cf. Monroe v. Pape, 1960, 365 U.S. 167. * * *

"* * * As a public official engaged in the performance of his duty it is clear that the defendant had a conditional privilege if he did not have an absolute one. *Such a privilege is a defense until 'malice' is shown, the burden being on the plaintiff. However, malice*

> *in this sense means something broader than personal ill will; it means an 'abuse' of the privilege.* * * * Entry upon private premises, without consent, on the assertion of a warrant, knowing that there is none, would seem to us a prime example of reckless indifference to the rights of the individual citizen however devoted the officer may, mistakenly, feel to what he considers his duty. * * *" (Emphasis added)

We respectfully request the attention of this Court to page 6 of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, heretofore filed with this Court, wherein the allegations set forth are identical to those in the *Kelley* case, for the allegations of the Complaint state that the Respondents did:

> "* * * willfully, intentionally and purposely deprive the Petitioner of his constitutional right to peacefully assemble under the First Amendment; did willfully, intentionally and purposely deprive and deny under the Fifth Amendment, his right not to be deprived of life and liberty without due process of law; did willfully, intentionally and purposely deprive the Petitioner of his constitutional rights under the Fourteenth Amendment to due process of law, to life, liberty, and due process of law and equal protection of the laws, by charging the Petitioner, after having been pleaded and begged by the Petitioner not to do so, did willfully, intentionally and purposely fire at, or upon the Petitioner certain tear gas and/or other type of gas projectiles, to intentionally, willfully and purposely deny the Petitioner's constitutional rights heretofore set forth."

Though these be naked allegations, the record of facts in this cause before the United States Court of Appeals for the Fifth Circuit fully substantiate a cause of action as the Court had before it the Government's deposition of the Petitioner, Cyril T. Faneca, Jr., Colonel Birdsong, and the Petitioner's deposition of James P. McShane.

The facts as shown through the depositions of Colonel T. B. Birdsong, Commissioner of Public Safety, Jackson, Mississippi, Cyril T. Faneca, Jr., and James P. McShane, clearly established that on September 30, 1962 Cox's federal contingent[1] of nervous, unseasoned, and untrained personnel (Birdsong's deposition, page 73) with no plans (McShane's deposition, page 37—Birdsong's deposition, page 27) were led onto the Campus by two-time loser McShane[2] and surrounded the Lyceum Building for the sole purposes of physical occupation of the campus, but for no purpose or plans of preventing or voiding any incident (McShane's deposition, pages 66-68), when the federal authorities knew that Meredith would not come to the Lyceum Building. The occupation took place at 4:00 P.M. on Sunday, September 30, 1962.

These depositions further show that at the time of the occupation, there was no demonstration or violence upon the campus (McShane's deposition, page 35—Birdsong's deposition, page 31) since, however, there is a sharp conflict between McShane's assertion, on the one hand, that there was violence subsequent to 6:00 P.M. on September

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1. The words "Federal Contingent" are supplied by Respondent's Brief on page 5, before United States Court of App. for the 5th Cir.

2. McShane's deposition, pages 10 and 94. See also *Time Magazine*, Vol. LXXX, No. 14, Oct. 5, 1962, where the Magazine states: "The trouble of James McShane has made news before. In 1954, as a New York Police Detective, he was temporarily demoted for getting his picture in the papers holding an umbrella over the head of heavyweight champion Rocky Marciano (McShane was off duty at the time and Marciano was an old pal). McShane also had the misfortune as chief marshal, of being assigned to bring the late spy, Robert Soblen back to the U.S.; as the plane approached London, Soblen took advantage of McShane's absence to stab himself."

30, 1962, justifying the marshal's actions, with the testimony of Colonel Birdsong and the Appellee, Cyril T. Faneca, Jr., on the other hand, that the actions of the marshals, was unwarranted, what actually transpired should be set forth in detail.

From Colonel Birdsong's deposition, we find:

"Q. Now, at 7:00 o'clock, had the situation changed?

A. Of course the crowd was growing.

Q. Growing all the time.

A. Yes, sir.

Q. At 7:00 o'clock how big a crowd would you estimate?

A. I wouldn't attempt to estimate it.

Q. You would have no idea?

A. No, sir.

Q. A thousand?

A. I wouldn't say.

Q. You don't know. Was it a big crowd or a little crowd?

A. Big crowd.

Q. Big crowd of people. Could you tell from looking at them whether they were mostly students?

A. I couldn't tell.

Q. At that time were your men still under instructions to keep people off the campus that didn't belong there?

A. That's right, yes, sir.

Q. And do you know whether they performed that function?

A. I am sure that they did.

Q. At 7:00 o'clock did you observe any acts of violence?

A. Not that I can recall." (page 32)

* *

"Q. And to the best of your recollection, up until 7:00 o'clock there were no signs of disorder?

A. Nothing but—you know—boisterous, everybody hollering and so forth and so on." (page 34)

* * *

"Q. Now let's move on a little toward the crisis. At 7:30, a half hour later, was there any change in the composition or number in the crowd? Was it getting bigger all the time?

A. It was, yes, sir.

Q. Was it getting rougher?

A. I would say it was.

Q. What were they doing?

A. I couldn't tell you exactly, because I was in and out of the Lyceum Building, on over to the Gym at my headquarters in the Alumni Building, and out at the blocks and all over the place." (page 40)

* * *

"Q. Did you see any objects or any missiles of any kind being thrown by the crowd at the Marshals?

Mr. Cates: Clarify the time.

Mr. Eardley: Any time—then I will get the time if he saw it.

A. I did not.

Q. You saw no missiles being thrown?

A. I did not until the gas went off. Where I was, I did not." (page 41)

* * *

"Q. Was there constant shouting going on—

A. —and the buildup—the crowd was getting larger.

Q. Were they still throwing cigarettes? Did you see that?

A. I paid not too much attention to that, but I presume they were.

Q. And it is your testimony that on no occasion between 7:00 and 8:00 o'clock did you see anything thrown, other than cigarette butts?

A. I didn't, no.

Q. You did not?

A. No, sir.

Q. Did you see or were you informed of any person being injured in that period?

A. During that period?

Q. Yes.

A. I don't think so, not that I remember." (page 42)

* * *

"Q. And all this time that you were out there, you saw nothing being thrown at the marshals?

A. Where I was in the center of that line, I saw nothing, other than as I stated, a few cigarettes and some pennies and stuff like that—where I was. Now I will say that there was some sort of commotion and I don't know what down on the left end of the line. I don't know what that was.

Q. Didn't you know, Colonel, that prior to the firing of the gas seven marshals had been hurt?

A. No, sir.

Q. You didn't know that?

A. I did not." (page 48)

* * *

From Cyril T. Faneca's deposition, we find:

"Q. Did you see any hostile actions by anybody at that time toward the Federal marshals?

A. No, sir, I did not.

Q. None whatsoever?

A. That's right.

Q. There was no shouting, no cursing?

Mr. Cates: Define what you mean by 'hostile.' In other words, you are assuming this is hostile.

Q. Was there any shouting of such phrases as 'Nigger Lovers' at the marshals?

A. Not that I recall hearing.

Q. The crowd was quiet?

A. I wouldn't say quiet.

Q. They were talking and not shouting? Is that it?

A. They may have been giving a few hotty-toddies.

Q. A few what?

A. It's a school cheer.

Q. Oh, What do you call it?

A. Hotty-toddies." (page 33)

* * *

During this time it is important to note that the activities of the law enforcement agencies—the Federal and State.

From McShane's deposition, we find:

"Q. Did you or not, your personnel, assist the Highway Patrolmen in pushing back the crowd.

A. No, because they were not doing anything to push the crowd back either.

Q. Did you ever on your own attempt to push back the crowd?

A. No, sir." (page 68)

* * *

From Colonel Birdsong's deposition:

"Q. What was your plan?

A. We established block immediately at all entries to the campus. Approximately as the men arrived they were put on these blocks. When I arrived there, there were just a few men. As I told you in the beginning, they coming in there in driblets. We established those six blocks at the entrance to prevent the entry of crowds and to allow in only authorized personnel. (page 23)

Q. At that time was it your opinion that your men could control this crowd?

A. We could help, and we did help. We did everything within our power to prevent violence.

Q. Does this mean that you could help, meaning that you thought that the marshals should also help control the crowd?

A. I thought it was suggested.

Q. But they weren't controlling the crowd, were they?

Mr. Clark: Mr. Eardley, may I make one suggestion, please, sir, I would like for Colonel Birdsong to be allowed to complete his full answer before another question is asked." (page 57)

* * *

"Q. At this point, was it your opinion that the State Patrol needed the help of the marshals to control that crowd?

A. This is prior to the gas?

Q. Prior to the gas.

A. Prior to the gas going off, in my opinion, had they not shot that gas, we could have inched that crowd back to the center of the grove, which was our purpose. We were going to attempt to do that, and I believe that had they not fired the gas that we may have

been successful. We may not, but we were willing to try.

Q. You were going to make an effort.

A. We were going to make an effort. (page 58)

Q. Just before the firing, was this road which was between the marshals and the State Patrolmen clear?

A. Yes, sir.

Q. No other persons were in there?

A. As far as I could see, there was not within my line of vision." (page 52)

* * *

Colonel Birdsong established that there was no coordination between the Federal forces and the State Patrolmen, but that the Federal forces never attempted to establish any coordination or divulge any of their plans.

From Colonel Birdsong's deposition, we find:

"Q. Did he tell you that the marshals were going to arrive at the airport?

A. No, sir.

Q. What did he tell you?

A. He didn't—I knew nothing about their plans, nobody told me anything about their plans, what they were going to do, and they planned to do. The only thing he wanted to know from me was where the Lyceum Building was and how to get to the airport." (pages 81-82)

* * *

Colonel Birdsong, in addition to announcing that the State Highway Patrolmen had a plan, clearly showed that up to the point of the unwarranted firing by the United States Government personnel, had placed the plan of mov-

ing the crowd back into operation, by taking the 50 or 75 men (Birdsong's deposition, page 30) and slowly pushing the crowd back. Here is the testimony from the transcript of his deposition (Birdsong's deposition, pages 45-46):

"Q. Then what happened?

A. Then we had some men down at the Gym, in front of the Gym and some on each wing of this crowd, in addition to those men that were right in front, so we got every man that we had in that vicinity and put them between the marshals and the crowd, and shoved the crowd back, very slowly, and we had them on the sidewalk. We had them on the sidewalk and I was right behind Senator Yarbrough and he was appealing to the crowd.

Q. Was he speaking over a loud speaker?

A. No, sir.

Q. How could he be heard if there was a mob shouting?

A. He couldn't be heard very well except by those people right around him.

Q. How close was he to the first rank of the crowd?

A. Right up against them.

Q. Did the crowd pay any attention to him.

A. They were listening to him, because they had to move back."

* *

Colonel Birdsong, based upon his 30 years of military experience and experience with law enforcement background, clearly showed the immaturity, nervousness and lack of training of the personnel as he stated (Birdsong's deposition, pages 73-75, and 76):

"Q. What, if anything, did you see during the night, starting at 8:00 o'clock, I guess, or any time be-

fore—any time, make it general—that would indicate to you, if it did, that the marshals were unseasoned or unskilled?

A. Well, in the very beginning it was self-evident that they were untrained or that they had not worked together enough, because they were highly nervous, and this first occasion that I had to see, that they would take off their helmets and don their masks. That was just one occasion that I saw. Now, of course there is a lot of things that the men know about and I don't.

Q. I only want what you know about it.

A. I understand that, sir.

Q. What was it that made you believe they were nervous?

A. It was self-evident. You could see it.

Q. What time was this?

A. This was practically from the time they arrived on the campus.

Q. Even though the crowd was not unruly and was not throwing anything at them, they were nervous?

A. Yes, sir.

Q. And what were they doing?

A. Well, you could just see that—

Q. What did they do?

A. Nothing except the expression of their faces. That's about all I can tell you.

Q. You mean you determined from the expression on their faces that they were nervous right from the beginning?

A. That's right.

Q. What else did you see to indicate to you—you made also a statement that they had not worked together. What indicated that to you?

A. It didn't seem that they were a team to me.

Q. How did that manifest itself?

A. Well, it was a kind of disjoined affair there. They didn't work as a team." (pages 73-75)

* * *

"A. I was present, but I didn't actually see it. In other words, I saw the gas propelled, I saw it fired. I saw it fired on a level instead of elevating it, but at the moment I didn't know who it had hit, except that I saw it fired into the backs of the patrolmen." (page 76)

* * *

In this condition precipitated by the marshals, it is important to know exactly what happened to the Appellee.

From the deposition of Cyril T. Faneca, Jr., we find:

"A Then, sir, a barrage of gas was fired, which caught us completely by surprise, and we were not expecting anything of this nature. And I grabbed Miss Skeen and—

Q. Pulled out?

A. No. As I said, I was toward the front, and I had no warning that there was going to be any barrage of gas fired, and the first thing I could think of, there was this tree about six feet behind us, and I pushed Miss Skeen behind the tree, and we ducked to avoid these projectiles which were whistling past our heads fired from these gas guns." (page 41)

* * *

"Q. And the fact that the men put on their gas masks didn't give you any clue, didn't give you a warning, that they were going to fire?

A. No, sir. I had no idea that any gas was going to be fired. I did not think the situation was serious enough to warrant any action of this type. That was my personal opinion, sir. Therefore I did not leave with my date. I stayed there.

Q. At that time you didn't know if any men had been injured by any flying pipes, Coke bottles or—" (page 43)

* * *

"A. I did not see it.

Q. You did not know anything about it?

A. I did not see and did not know. That is correct.

Q. And your testimony is that this all took place when it was still light and it was dusk?

A. Yes, sir.

Q. What did you do then? You pushed the girl behind the tree to get her out of the way?

A. Yes, sir, to avoid these missiles.

Q. Then did you leave?

A. Yes, sir, I grabbed her and we ran to the 'Y' Building through all the gas. The grove was saturated with gas. Ran to the 'Y' Building and immediately washed out our eyes and removed our contact lenses." (pages 43-44)

* * *

"Q. How long after the tear gas was fired was it before you arrived at the U. M. C. A.?

A. We ran immediately to the 'Y'.

Q. So it was just a matter of a few minutes?

A. Matter of a minute.

Q. Before you got there and washed your eyes?

A. Yes, sir.

Q. Well, the headache and nausea didn't occur at this time, did it.

A. At this time, sir, I was quite upset and excited, and I don't recall the nausea at this particular time, no, sir.

Q. You were concerned about the safety of the girl?

A. I was concerned about the safety of the girl and of getting out of trouble." (page 44)

* * *

"A. Then we left the 'Y' Building and we walked—

Q. The 'Y' is that building directly across the grove from the Lyceum, is it?

A. Yes, sir.

Q. And you walked where?

A. We walked, our destination was the Student Union Building. We were heading—

Q. —I guess I'd better get over there with you. Why was it you went to the 'Y'?

A. We went to the 'Y' because it was the closest building where we could get the water to wash our eyes, which were severely irritated, and she had contact lenses on which were causing even more irritation.

Q. Why did you not go to Peabody Hall?

A. To go to Peabody we would have had to go parallel to the gas.

Q. You were escaping the gas.

A. That was the primary objective, to get away from the gas and get our eyes washed out.

Q. In order to get to this Student Union—

A. Peabody is a classroom.

Mr. Cates: A classroom, and everything is closed. This is Sunday.

Mr. Eardley: Thank you, Mr. Cates—I know you are being helpful.

Mr. Cates: The U.M.C.A. Building is open 24 hours a day.

Q. If you were to go directly to the Student Union, you would have to go back in the gas filled area, wouldn't you? University Avenue would take you right back where them marshals were firing?

A. Allow me to show you exactly what I did. I took Miss Skeen, and we went in front of the Fine Arts Building—

Q. —Let's mark this line. This is the seven o'clock line. We'll mark this one 'seven'.

A. I took Miss Skeen and we went over to this side as far as possible.

Q. You didn't go on any established road? You cut through?

A. That's correct. Cut through between buildings.

Q. So you escaped the gas area?

A. Yes, sir. To escape the gas area, we went between Peabody and Fulton Chapel, which is here (indicating). We swung wide around and came out over here.

Mr. Cates: Behind what building?

A. This is the Commerce Building. We came up between.

Q. You went behind Peabody?

A. Went behind Peabody, yes sir, we came out over here.

Q. You came out behind the Lyceum?

A. We came out diagonally from the Lyceum.

Q. Were there Federal marshals around the building on that corner where you came out?

A. I don't recall. At the time, as I said, we were walking up toward the Student Union Center. Miss Skeen was quite upset and was crying, as you could well imagine, a considerable amount. We were walking along—we were intending to walk along here (indicating), so when we got to this point—

Q. Let's mark that point. That is very important. This point you have marked with a number of circles is right on the northwest corner of Commerce—

Mr. Cates: —Building, which is known as Conner Hall.

Q. All right. What happened at that point?

A. At that point, about six or eight marshals broke from the ranks over here at the Lyceum, somewhere in this vicinity here.

Q. Let's mark that because this is very important to your lawyer. Mark it right here with three parallel lines. (Witness marks)

Q. And this is on the northwest—

A. —Northwest corner of the Lyceum.

Q. There were a group of marshals—

A. —All shoulder to shoulder.

Q. And when they saw you, they broke ranks?

A. That's correct.

Q. And ran toward you and the girl?

A. And ran toward me, the girl and myself.

Q. And then what happened?

A. She had been crying, and when she turned and she caught them out of the corner of her eye, to the side coming toward us, she almost went hysterical she became so upset, and was trying to run, trying to get me to run with her to escape these people.

Q. You mean they were trying to catch you?

A. Well, from all indications. They were running. There was no one around us. Just the girl and I.

Q. Well, they ran toward you? Is that it?

A. That is correct.

Q. How far away from you were they when they started running?

A. I don't know how far away they were when they started running.

Q. Was it a hundred yards?

A. No, sir, it wasn't that far. As you can see, the Lyceum Building is right here. (indicating)

Q. You tell me, I don't know that area. Is it 50 yards?

Mr. Eardley: . . . Mr. Cates has been scaling it off, and I heard him mutter 'a hundred'. Is that what it is, from the Lyceum to the place where he was standing?

Mr. Cates: To Conner Hall, yes, sir.

Q. What did you do when you saw these fellows start running toward you?

A. Sir, my immediate reaction was to freeze, and I was trying to and so was Miss Skeen. I didn't want to run. I felt that there was no need for me to be running.

Q. You hadn't done anything wrong?

A. I had done nothing wrong.

Q. You didn't throw anything?

A. I had thrown nothing. I realized—I assumed they were running toward us; there was no one around us. As they were approaching us, I yelled at them and said, 'Don't shoot. We don't want any gas over here,' or something to the effect, 'There's just a girl and myself and we are not doing any harm.' Of course, I was upset at the time. I was yelling.

Q. Were you using any profanity?

A. No, sir, I did not use any profanity. I was in the presence of Miss Skeen.

Q. Were you both very close together?

A. Yes, sir, we were very close together. I was holding Miss Skeen. As I said, she was almost hysterical, and I was trying to keep—trying to keep her from just darting off wildly in the condition she was in.

Q. You shouted at them, 'Please don't shoot'?

A. Yes, sir.

Q. And you were both standing together when you did that?

A. Yes, sir, we were.

Q. And there were no other people present other than the marshals?

A. No, sir.

Q. Was there a lot of noise and confusion and shouting?

A. No, sir, there was not. There was no one around in my near vicinity.

Q. And this event took place how many minutes after the first tear gas had been fired in front of the Lyceum?

A. Five or ten minutes.

Q. And you asked them not to shoot, and did they shoot?

A. Yes, sir, they did.

Q. What did they shoot?

A. They fired with gas guns.

Q. How far away from you were they when they fired?

A. I would say, roughly, ten yards.

Q. Just ten yards?

A. Yes, sir.

Q. Did the gas explode in front of your feet?

A. Yes, sir, it exploded at our feet.

Q. What did you do then? Did you run?

A. Sir, at that time I was even more shocked that they were doing this. I mean, it was hard to realize that this was happening.

Q. I didn't ask you that. What did you do?

A. I stepped back a few feet to back off from the gas.

Q. From the gas?

A. From the gas, which as I said, caused temporary blindness, and yelled at them to use their common sense and not to fire at us, and we were doing nothing.

Q. That is your language as you best remember, 'Use your common sense'?

A. 'Use your common sense'.

Q. How many projectiles, or whatever it was—grenades—how many were fired, as you remember?

A. I recall two being fired.

Q. Did they both land in front of you and Miss Skeen?

A. They both landed close to us. I don't recall whether it was exactly in front or to the side, but it would have been a few feet.

Q. You shouted, 'Use your common sense,' and then did you leave?

A. Yes, sir.

Q. And you went to the Student Union?

A. No, sir. At that time the most important thing after this act was to get off the campus. I thought that if the conditions were such that you couldn't even walk along there, we had best get off the campus completely." (pages 45-52)

* * *

III

We respectfully submit in conclusion that the above facts as recited from the depositions in this law suit, clearly show that it was a case falling completely within the limits as set forth in the *Kelley* case, *supra*. We therefore re-

spectfully suggest that there is a conflict between the United States Court of Appeals for the First Circuit and the United States Court of Appeals for the Fifth Circuit and for this additional reason writ of certiorari should be directed to the United States Court of Appeals for the Fifth Circuit for a full and complete hearing in this matter.

Respectfully submitted this the 20th day of April, 1965.

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